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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1946

## No. 206

EUGENE KOSTER, PETITIONER,

*vs.*

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 17, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1946

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(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY

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[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT**

EUGENE KOSTER, Appellant,

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee, and James S. Kemper and James S. Kemper & Co., Inc., Defendants

STATEMENT UNDER RULE 13

The above entitled action was commenced on October 20, 1944, by filing the complaint in the office of the Clerk of the United States District Court for the Eastern District of New York. No order of arrest has been issued herein and no property of any defendant has been attached.

The appellee, (American) Lumbermens Mutual Casualty Company, moved to dismiss the complaint on the ground of *forum non conveniens*, and on other grounds.

An order granting said motion and dismissing the complaint was entered on February 7, 1945.

Notice of appeal was filed on April 27, 1945. The names of the original parties are above set forth and there has been no change of parties since the commencement of the action.

Appellant appears by Alfred Gurkin, Esq.

Appellee appears by Townley, Updike & Carter, Esqs.

Defendant James S. Kemper & Co., Inc., appears by Alexander & Ash, Esqs.

Defendant James S. Kemper has not been served and has not appeared in this action.

[fol. 2] IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action. File No. C-4322

EUGENE KOSTER, Plaintiff,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, James S. Kemper, James S. Kemper & Co., Inc., Defendants

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Alfred Gurkin, Esq., plaintiff's attorney, whose address is 152 West 42nd St., N. Y. City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Percy G. B. Gilkes, Clerk of Court, by Nan V. McNabb, Deputy Clerk. (Seal of Court.)

Date: October 20, 1944.

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[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT

Plaintiff alleges on information and belief, except paragraph "1", subdivisions "(a)" and "(g)", and paragraph "2", which he alleges on knowledge:

As a first cause of action against defendants James S. Kemper and (American) Lumbermen's Mutual Casualty Company of Illinois

1. (a) Plaintiff is a citizen of the State of New York and a resident of its Eastern District.

(b) Defendant (American) Lumbermen's Mutual Casualty Company of Illinois ("Lumbermen's" here-

after), incorporated in 1912, was at all times since and now is a mutual insurance company organized under the laws of the State of Illinois.

(c) Defendant James S. Kemper ("Kemper" hereafter) is a citizen of the State of Illinois.

(d) Defendant James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), incorporated in 1927, was at all [fol. 4] times since and now is a corporation organized under the laws of the State of Illinois.

(e) The jurisdiction of the Court depends on diversity of citizenship.

(f) The amount in controversy, exclusive of interest and costs, exceeds $3,000.

(g) The action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

2. (a) Since May, 1941, plaintiff has been and he now is a member and policy holder of Lumbermen's.

(b) Plaintiff brings this action in the right of Lumbermen's and on behalf of all its members and policy holders.

3. The directors of Lumbermen's from 1925 to date and their times of tenure are listed in Schedule A annexed hereto.

4. (a) Since 1916 Kemper has been and he now is the President, Manager and Chairman of the Board of Directors of Lumbermen's.

(b) By reason of family relation, friendship and business association, the other directors and officers of Lumbermen's were at all times herein mentioned and still are dominated and controlled by Kemper in such manner that they were and are subservient to his wishes and directions without regard to the best interests of Lumbermen's.

(c) By reason of the premises Kemper did at all times herein mentioned and still does dominate and control the management, personnel and business policies of Lumbermen's.

[fol. 5] (d) The acts and omissions of Lumbermen's hereafter alleged were caused by Kemper.

5. Prior to 1942, the aggregate salary and other compensation paid by Lumbermen's to Kemper was less than $75,000 per year.

6. For the year 1942, Lumbermen's paid Kemper salary and other compensation aggregating $251,543.63, an increase of more than 235% over the preceding year.

7. Such salary and other compensation for 1942 were in excess of the reasonable value of Kemper's services because:

(a) The amounts paid to Kemper prior to 1942 were full and adequate compensation for his services; were so determined by the Board of Directors of Lumbermen's; and were so recognized and accepted by Kemper;

(b) The extent of Kemper's services in 1942 was not in excess of those in prior years;

(c) The gross earnings and net income of Lumbermen's in 1942 had increased by no more than 6.78% and 12.25%, respectively, over those in the preceding year;

(d) The 1942 salaries and other compensation of other managing executives holding positions comparable to those of Kemper in insurance companies similar to Lumbermen's were not substantially increased over those for the preceding year, except to the extent of reflecting promotions in individual cases;

(e) Kemper did not devote his full time and services to Lumbermen's, but occupied executive positions in several other insurance corporations and agencies.

[fol. 6] 8. To the extent that the 1942 payments by Lumbermen's to Kemper were in excess of Kemper's compensation for the preceding year, they were without consideration and constituted a gift of corporate assets.

9. The 1942 increase in Kemper's salary and other compensation was not revealed to the members and policy holders of Lumbermen's either in the notices of meeting or in the annual reports sent to them.

10. By reason of the premises Lumbermen's has sustained substantial damages.

11. Demand by plaintiff that the Board of Directors of Lumbermen's bring this action was not made, and would have been futile, because

(a) The members of the Board of Directors are dominated and controlled by Kemper;

(b) They have remained inactive although they have long had knowledge of the acts herein alleged;

(c) They participated in the wrongs herein alleged;

(d) They would not and could not have diligently prosecuted this action because, in effect, they would have had to bring it against themselves.

12. Plaintiff has no adequate remedy at law.

As a second cause of action against all defendants

13. Plaintiff realleges paragraphs "1"-"4" and "11".

14. (a) At all times since the organization of Kemper & Co., Kemper and family members, friends, associates, agents and employees of his held and still hold all or the majority of the capital stock of Kemper & Co.

[fol. 7] (b) By reason of the premises, Kemper did during all such times and still does dominate and control the management, personnel and business policies of Kemper & Co.

(c) During all such times Kemper and members of his family had and they still have the beneficial enjoyment of all or the major portion of the profits of Kemper & Co.

15. At all times since its organization Kemper & Co. has been engaged in business as an insurance agent.

16. (a) During all such times Lumbermen's employed Kemper & Co. as its agent for the transaction of insurance business in various parts of the United States.

(b) During all such times Lumbermen's paid substantial sums to Kemper & Co. as commissions, fees and otherwise.

17. (a) During all such times and since prior to 1927, Lumbermen's did and it still does maintain branch

offices staffed with its own employees throughout the United States; engage in extensive advertising campaigns; entertain numerous brokerage contacts; and solicit and write insurance without the intervention of a separate or independent agency.

(b) By reason of the premises Lumbermen's had and still has the organization, personnel, equipment, facilities and business connections to carry on its business and sell insurance without employing the services of Kemper & Co.

(c) Lumbermen's could have secured the same amount of business and could have conducted it with equal efficiency, without employing and paying for the purported services of Kemper & Co.

18. (a) The directors, officers, executives and certain employees of Kemper & Co. were at all times herein men-
[fol. 8] tioned and still are directors, officers, executives, or employees of Lumbermen's.

(b) At all times herein mentioned the office space used or occupied by Kemper & Co. throughout the United States was and still is part of the office space owned or rented by Lumbermen's.

(c) At all times herein mentioned Kemper & Co. did and it still does use the organization, personnel, assets and facilities of Lumbermen's in the conduct of its business.

19. (a) Kemper caused Lumbermen's to employ Kemper & Co. as its agent, as aforesaid.

(b) Kemper took such action not with a view to the best interests of Lumbermen's, but for the purpose of enriching himself, the members of his family, his friends and associates interested in Kemper & Co.

20. (a) Kemper and the other directors and officers of Lumbermen's concealed the facts herein alleged from the members and policy holders.

(b) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1944, shortly before the commencement of this action.

21. (a) By reason of the premises Lumbermen's sustained substantial damage and the other defendants derived substantial profits.

(b) The precise amounts of such damage and profits being unknown to plaintiff, an accounting therefor by the defendants other than Lumbermen's is necessary.

22. Plaintiff has no adequate remedy at law.

[fol. 9] As a third cause of action against defendants Kemper and Lumbermen's

23. Plaintiff realleges paragraphs "1"-"4", "11" and "20".

24. (a) On or about January 29, 1926, Lumbermen's caused American Motorists Insurance Co. ("Motorists" hereafter) to be organized as a stock corporation under the laws of the State of Illinois.

(b) From its organization to date, Motorists has been and it is engaged in the insurance business.

(c) By reason of the sponsorship by Lumbermen's Motorists partook of the prestige, trade acceptance and goodwill enjoyed by Lumbermen's and had access to its business connections and brokerage contacts.

25. (a) From the organization of Motorists to December 30, 1927, Lumbermen's held 11,566⅔ shares of stock of Motorists out of a total of 11,666⅔ shares issued.

(b) From December 30, 1927 to December 31, 1943, Lumbermen's acquired an aggregate of 11,709⅔ shares and sold an aggregate of 15,035⅔ shares of Motorists.

26. (a) Lumbermen's received for the 15,035⅔ shares of stock of Motorists sold from December 30, 1927 to December 31, 1943, a total aggregate price of $916,163.62.

(b) The names of the purchasers, the dates of the sales, the numbers of shares sold, the price of each sale and the liquidating value per share at such dates are listed in Schedule "B" annexed hereto.

27. (a) The individuals to whom Lumbermen's sold the shares of Motorists, as aforesaid, were directors or officers [fol. 10] of Lumbermen's, family members, friends and business associates of theirs.

(b) The officers and directors of the corporations to which Lumbermen's sold stock of Motorists, as aforesaid, were also officers or directors of Lumbermen's or family

members, friends or associates of officers or directors of Lumbermen's.

(c) Kemper was an officer and director of each such corporation.

28. The prices at which Lumbermen's sold the shares of Motorists, as aforesaid, were inadequate because

(a) The aggregate liquidating value of said shares, at the respective times of the sale thereof, was $144,956.72 greater than the prices paid therefor;

(b) The aggregate true value of said shares, at the respective times of the sale thereof, was substantially greater than their liquidating value;

(c) Said shares were not publicly traded and had no established market value.

29. The facts alleged in paragraphs "23", "28" were known to Kemper and the other directors of Lumbermen's at the times said shares were sold, as aforesaid.

30. (a) Kemper caused the sale of said shares not with a view to the best interests of Lumbermen's, but for the purpose of enriching himself, his family members, friends and business associates.

(b) Kemper caused the sale of said shares pursuant to a conspiracy entered into from time to time between himself, the other directors of Lumbermen's and the purchasers of the shares.

[fol. 11] 31. In causing said shares to be sold, Kemper did not safeguard the interests of Lumbermen's with the care and diligence of a reasonably prudent business man.

32. (a) From 1930 through 1943, annual cash dividends aggregating $30.90 were paid on each share of Motorists.

(b) In 1943 a 33⅓% stock dividend was distributed on each share of Motorists.

(c) The aforesaid purchasers of stock of Motorists either retain such stock or have resold it at a profit; the exact dispositions are unknown to plaintiff and must be disclosed by an accounting.

(d) The present liquidating value of each share of Motorists, after giving effect to the stock dividend, is

$109.02; the true value of each such share is substantially greater.

33. By reason of the premises, Lumbermen's sustained damages in excess of $1,000,000 and the purchasers of said shares realized profits substantially in excess of such loss.

34. Plaintiff has no adequate remedy at law.

As a fourth cause of action against Kemper and Lumbermen's

35. Plaintiff realleges paragraphs "1"-"4", "14", "26" and "27", subdivisions (b) and (c).

36. Since prior to August 1, 1942, National Retailers' Mutual Insurance Company ("Retailers' Mutual" hereafter) has been and it now is a mutual insurance company incorporated under the laws of the State of New York.

[fol. 12] 37. (a) Prior to August 1, 1942 Retailers' Mutual issued and sold $375,000 principal amount of its Guarantee Fund Debentures.

(b) By the terms of each of said debentures Retailers' Mutual undertook to pay in perpetuity at least 5% interest annually upon the principal amount thereof.

(c) By the terms of each of said debentures, the principal amount thereof was and is not redeemable or callable by Retailers' Mutual, except upon the dissolution of Retailers' Mutual.

38. On or about August 1, 1942 Lumbermen's owned and held $225,000 principal amount of the Guarantee Fund Debentures of Retailers' Mutual.

39. (a) On or about August 1, 1942, and at various dates thereafter, Lumbermen's sold an aggregate of $112,050 principal amount of said debentures.

(b) Upon each such sale the purchase price was equal or substantially equal to the principal amount of the Guarantee Fund Debentures thus sold.

(c) The approximate dates of such sales, the names of the purchasers, the amounts of debentures sold, and the prices paid therefor are listed in Schedule C annexed hereto.

40. The individuals to whom Lumbermen's sold the Guarantee Fund Debentures of Retailers' Mutual, as afore-

said, were directors or officers of Lumbermen's; their family members, friends and business associates.

41. The prices at which Lumbermen's sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were inadequate because:

[fol. 13] (a) Said debentures bore interest at the rate of 5% annually;

(b) Their security was equal to, or better than, the security of corporate bonds of the highest grade investment rating;

(c) Such security rested upon the facts, among others, that the net assets of Retailers' Mutual (substantially all of which were liquid) had and have a value of more than four times the total amount of said debentures outstanding; and that the annual net earnings of Retailers' Mutual were and are more than twelve times the amount of the annual interest payable on such debentures;

(d) Bonds or debentures of comparable security, bearing a similar rate of return and having analogous redemption and other features, were at the time of these sales traded at prices approximately equal to 200% of par;

(e) The fair and reasonable value of the aforesaid Guarantee Fund Debentures, at the time of each of said sales, was not less than 200% of par.

42. The facts alleged in paragraphs "36"-"41" were known to Kemper at the time said Guarantee Fund Debentures were sold, as aforesaid.

43. Kemper caused the sale of said Guarantee Fund Debentures not with a view to the best interests of Lumbermen's but for the purpose of enriching himself, his family members, friends and business associates.

44. In causing said Guarantee Fund Debentures to be sold, Kemper did not safeguard the interests of Lumber- [fol. 14] men's with the care and diligence of a reasonably prudent business man.

45. By reason of the premises, Lumbermen's sustained damages in excess of $112,050.

46. Plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment:

1. Requiring the defendants named in each cause of action, except Lumbermen's, to account to Lumbermen's for the damages and profits alleged therein, with interest;

2. Awarding plaintiff the costs and expenses of this action, including reasonable counsel and accountants' fees; and

3. Granting plaintiff such other and further relief as may be just.

Alfred Gurkin, Attorney for Plaintiff, Office & P. O. Address, 152 West 42nd Street, Borough of Manhattan, City of New York.

(Verified October 19, 1944.)

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[fol. 15] SCHEDULE "A"

Directors of Lumbermen's, 1925 Through 1943

| *Name* | *Tenure* *From* | *Through* |
|---|---|---|
| H. W. Chandler | 1925 | 1930 |
| E. W. Dierssen | 1925 | 1931 |
| G. J. Farnsworth | 1925 | 1940 |
| E. E. Hooper | 1925 | 1934 |
| H. G. Kemper | 1925 | 1943 |
| J. S. Kemper | 1925 | 1943 |
| C. A. L. Rurmort | 1925 | 1930 |
| C. M. Rurmort | 1931 | 1940 |
| H. E. Stone | 1932 | 1943 |
| H. A. Wheeler | 1936 | 1943 |
| Mark Kemper | 1936 | 1943 |
| L. G. Rurmort | 1941 | 1943 |
| James D. Cunningham | 1941 | 1943 |

SCHEDULE "B"

Sales by Lumbermens of Stock of Motorists



| Names of Purchasers | Date of Sale | No. Shares Sold | Price Per Share | Total Proceeds of Sales | Liquidating Value Per Share | Excess of Liquidating Value Per Share Over Price Per Share | Total Excess of Liquidating Value Over Proceeds |
|---|---|---|---|---|---|---|---|
| Chandler, Farnsworth and Kemper | 12/30/27 | 5,500 | $53.47 | $294,119.18 | $53.52 | $ .05 | $14,705.95 |
| H. G. Kemper | 4/12/29 | 125 | 63.45 | 7,931.43 | 63.45 | | |
| Commercial Mutual Underwriting Corp. | 12/30/31 | 8,496⅔ | 65.00 | 546,433.33 | 73.25 | 8.25 | 69,358.00 |
| National Illinois Corporation | 9/16/35 | ⅔ | 62.00 | 41.34 | 89.43 | 27.43 | 18.29 |
| Mrs. Gertrude Z. Kemper | 3/31/37 | 30 | 70.00 | 2,100.00 | 108.24 | 38.24 | 1,147.20 |
| H. J. Giffing | 3/31/37 | 5 | 70.00 | 350.00 | 108.24 | 38.24 | 191.20 |
| R. H. Campbell | 3/31/37 | 5 | 70.00 | 350.00 | 108.24 | 38.24 | 191.20 |
| A. H. Stringe | 3/31/37 | 35 | 70.00 | 2,450.00 | 108.24 | 38.24 | 1,338.40 |
| Harry A. Wheeler | 3/31/37 | 25 | 70.00 | 1,750.00 | 108.24 | 38.24 | 956.00 |
| W. B. Morrell | 3/31/37 | 15 | 70.00 | 1,050.00 | 108.24 | 38.24 | 573.60 |
| H. W. Lunsche | 4/7/37 | 7 | 70.00 | 490.00 | 108.24 | 38.24 | 267.68 |
| J. C. Wilson | 4/22/37 | 10 | 70.00 | 700.00 | 108.24 | 38.24 | 382.40 |
| Frank J. Heitman | 4/26/37 | 70 | 70.00 | 4,900.00 | 108.24 | 38.24 | 2,676.80 |
| American Motorists Insurance Co. | 4/28/37 | 2 | 30.00 | 60.00 | 108.24 | 78.24 | 156.48 |
| National Retailers Mutual Insurance Co. | 4/30/37 | 50 | 70.00 | 3,500.00 | 108.24 | 38.24 | 1,912.00 |
| J. E. Magnus | 4/19/39 | 25 | 69.00 | 1,725.00 | 116.80 | 47.80 | 956.00 |
| R. J. Dunn | 8/ 1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Chase M. Smith | 8/ 1/42 | 75 | 66.67 | 5,000.00 | 135.69 | 69.02 | 5,176.50 |
| Gertrude Z. Kemper | 8/ 1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Charles E. Good | 8/ 1/42 | 75 | 66.67 | 5,000.00 | 135.69 | 69.02 | 5,176.50 |
| Norris C. Flanagin | 8/ 1/42 | 115 | 66.67 | 7,666.67 | 135.69 | 69.02 | 7,937.30 |
| Robert H. Campbell | 8/ 1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Edward S. Beck (Dec'd) | 8/ 1/42 | 70 | 66.67 | 4,666.67 | 135.69 | 69.02 | 4,831.40 |
| Marie J. Rowe | 8/ 1/42 | 38 | 66.67 | 2,533.33 | 135.69 | 69.02 | 2,622.76 |
| Dwight S. Bobb | 8/ 1/42 | 150 | 66.67 | 10,000.00 | 135.69 | 69.02 | 10,353.00 |
| H. E. Stong | 8/ 1/42 | 100 | 66.67 | 6,666.67 | 135.69 | 69.02 | 6,902.00 |
| Central Mortgage Co. | 1943 | 11⅓ | 60.00 | 680.00 | 140.67 | 80.67 | 914.26 |
| Totals | | 15,035⅔ | | $916,163.62 | | | $144,956.72 |

fol. 17] SCHEDULE "C"

Sales by Lumbermens of Guaranty Fund Debentures of Retailers Mutual

| Date | Names of Purchasers | Par Value of Debentures Sold | Consideration Received |
|---|---|---|---|
| 8/ 1/42 | Charles M. Purmort | $10,000.00 | $10,000.00 |
| 8/ 1/42 | Charles E. Good | 5,000.00 | 5,000.00 |
| 8/ 1/42 | Norris C. Flanagin, City National Bank and Trust Co. and Hathaway G. Kemper, Trustees | 2,500.00 | 2,500.00 |
| 8/ 1/42 | No. T/A 22217 | 25,000.00 | 25,000.00 |
| 8/ 1/42 | Robert H. Campbell | 3,000.00 | 3,000.00 |
| 8/ 1/42 | Edward S. Berk | 5,500.00 | 5,500.00 |
| 8/ 1/42 | Vance C. Smith, Jr. | 1,000.00 | 1,000.00 |
| 8/ 1/42 | H. G. Kemper | 9,000.00 | 9,000.00 |
| 8/ 1/42 | Harry E. Stone | 3,500.00 | 3,500.00 |
| 8/ 1/42 | James S. Kemper | 4,000.00 | 4,000.00 |
| 8/ 1/42 | James S. Kemper & Co. | 20,000.00 | 20,000.00 |
| 8/ 1/42 | Marjorie B. Haviland | 1,200.00 | 1,200.00 |
| 8/ 1/42 | Joan Stover | 1,000.00 | 1,000.00 |
| 9/30/42 | Mary S. Kemper | 5,600.00 | 5,600.00 |
| 11/16/43 | Central Mortgage Co. | 5,750.00 | 5,865.00 |
| 1/20/43 | Central Mortgage Co. | 7,000.00 | 7,140.00 |
| 7/ 2/43 | Central Mortgage Co. | 3,000.00 | 3,060.00 |
| | Totals | $112,050.00 | $112,375.00 |

[fol. 18] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION

To Alfred Gurkin, Esq., 152 West 42nd Street, New York 18, N. Y.

SIR:

Please take notice that, upon the complaint herein, verified October 19, 1944; upon the annexed affidavit of T. H. Gillespie, sworn to December 23, 1944 and upon the annexed affidavit of Stuart N. Updike, sworn to December 26, 1944, the undersigned will apply to this Court at a Term thereof for motions in the United States Court House, Post Office Building, Washington Street, Borough of Brooklyn, City and State of New York on the 10th day of January, 1945, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard:

(1) For an order dismissing plaintiff's complaint herein, without prejudice, on the ground that this Court in its discretion should not entertain jurisdiction over an action requiring it to interfere with and

control the internal affairs of a foreign insurance corporation, to wit, defendant (American) Lumbermens Mutual Casualty Company; and

(2) For an order dismissing plaintiff's complaint, on the ground that an indispensable party defendant has not been served; and

[fol. 19] (3) For an order granting such other and different relief as to the Court seems proper.

Dated, New York, New York, December 27, 1944.

Townley, Updike & Carter, By Stuart N. Updike, Attorneys for Defendant (American) Lumbermens Mutual Casualty Company, Office and P. O. Address, 220 East 42nd Street, New York 17, N. Y.

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IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF T. H. GILLESPIE IN SUPPORT OF MOTION

T. H. Gillespie, being duly sworn, deposes and says:

1. I am an officer, to wit, a Secretary, of Lumbermens Mutual Casualty Company, an Illinois corporation, having its principal place of business in the City of Chicago, Cook County, Illinois (licensed and doing business in the [fol. 20] State of New York under the name "(American) Lumbermens Mutual Casualty Company of Illinois" and sued herein as "(American) Lumbermens Mutual Casualty Company." Said defendant is hereinafter referred to as "Lumbermens."

2. This affidavit is made in support of an application by defendant Lumbermens to dismiss the complaint herein, without prejudice, on the ground that it would be an unwarranted and unlawful interference with the management and internal affairs of a foreign corporation for this Court to assume jurisdiction of the alleged causes of action set forth in the complaint. I am personally familiar, by reason of my official duties with Lumbermens, with the facts and information hereinafter set forth.

*The Plaintiff*

3. As appears from the complaint herein, plaintiff is a citizen of New York and a resident of the Eastern District. He alleges himself to have been a policy holder of defendant Lumbermens since the month of May, 1941. For the information of the Court, he has held policy number 8561182, which, in general, insures him as the owner of an automobile against loss on account of injuries to person and property of others. Since May, 1941, he has paid to Lumbermens by way of premiums a total of less than $250.

*Defendant Lumbermens*

4. Lumbermens was organized as a mutual insurance company under the laws of the State of Illinois in 1912. Its corporate existence has continued wtihout interruption since said date. It has been licensed to transact its business in New York State since 1927, and its regularly filed full annual reports have been matters of public record in [fol. 21] said State since said date. By its most recent report to the Director of Insurance of the State of Illinois, it had admitted assets of $32,941,954, liabilities (including voluntary reserves) of $44,941,954, and its aggregate net premiums from all sources in 1943 were $31,399,515.

5. Lumbermens is licensed by, and does business in, every one of the states of the United States, as well as the Dominion of Canada. It employs approximately 2,144 persons, located in well over half of the states of the United States. Of that number, approximately 750 are employed in the offices located in the City of Chicago, Illinois, where the head offices of Lumbermens have always been located since its organization.

6. The directors of Lumbermens are seven in number, five of whom are citizens and residents of the State of Illinois. The regular business addresses of all of said five are in the City of Chicago, Illinois, although not all of them reside within the corporate limits of said city. The two directors who are not residents of Illinois live, respectively, in Van Wert, Ohio, and in Lexington, Massachusetts. All of the officers of defendant Lumbermens are citizens and residents of Illinois, with the exception of those whose duties are limited to the underwriting and service phases of the respective branch offices to which they are as-

signed. Such officers attached to branch offices would have no personal knowledge and no substantial information concerning the controversies presented by the complaint herein.

7. All of the general records and all of the control records governing the business of Lumbermens as an entirety, are maintained in and physically present at its offices in Chicago, or in warehouses located in Chicago.

[fol. 22] 8. As noted above, Lumbermens is licensed to do business in New York under the supervision of the Superintendent of Insurance of said State. It has offices in several cities of said State, including New York City, Syracuse, Buffalo and others. None of its employees in said State has had any connection with the acts alleged as the subject matter of any of the four causes of action in plaintiff's complaint; and none of its records in New York State relate thereto, except in so far as annual reports of Lumbermens are filed with the Superintendent of Insurance in said State, and except in so far as the detailed records of sales and underwriting activities with regard to local business in New York State would be found there.

*The Complaint*

9. The complaint purports to state four causes of action. Disregarding the vague, uncertain, ambiguous and at times incomprehensible allegations of the complaint, a general statement of what appears to be the intendment of each cause of action is as follows:

*First Cause*

Defendant James S. Kemper (who, upon information and belief, has not been served in this action) received from Lumbermens an unwarranted increase in salary and other compensation for the year 1942;

*Second Cause*

Defendant James S. Kemper & Co., Inc., an Illinois corporation, received commissions, fees and other payments for services to Lumbermens, which Lumbermens could have rendered as efficiently for itself with its own employees;

[fol. 23] *Third Cause*

James S. Kemper caused Lumbermens, at various times, to sell stock of American Motorists Insurance Co., an Illinois corporation, to himself and others for sums substantially less than the true value of said stock; and

*Fourth Cause*

James S. Kemper caused Lumbermens to sell Guarantee Fund Debentures of National Retailers Mutual Insurance Company to himself and others for sums substantially less than the true value of said Debentures.

By reason of the nature of the instant application, it will be assumed, although of course not conceded, that the allegations of the complaint are meritorious.

*On the Facts, This Court Should Decline Jurisdiction Without Prejudice, and Relegate Plaintiff to the Proper Jurisdiction*

10. I respectfully submit that, on the facts stated above, and those hereinafter appearing, the conduct of this lawsuit will result in measurable monetary damage, and incalculable additional harm to Lumbermens if it remains in this forum. In the first place, it will be obvious that, were plaintiff entirely successful, the net effect of the recovery by Lumbermens upon plaintiff's interest in that Company would be negligible. The most such recovery could accomplish would be an increase in the dividends applicable to his policy. The entire aggregate of premiums paid by plaintiff since he has been a policyholder is less than $250, and he has received dividends at the rate of approximately 20 percent of the premiums on all completed policy years. In the second place, the measurable harm and monetary damage to Lumbermens, whether [fol. 24] plaintiff wins or loses, would accrue in the following respects:

(1) Vast quantities of records, dealing with compensation, agency fees, agency practice, brokerage relationships and commissions, and underwriting, in-

spection and claim expenses, and an infinite variety of insurance and management detail, over a long period of years will be demanded to be transported to the Eastern District of New York for examinations before trial or for the trial itself;

(2) The travelling expenses of officers, directors and employees of Lumbermens between Chicago and the Eastern District of New York, and their hotel expenses while there, would have to be met;

(3) The loss of time on the part of such officers, directors and employees while travelling, and their inability to attend to their normal duties for Lumbermens would cause direct monetary loss, as well as unmeasurable indirect damage;

(4) The travelling and other expenses of the Director of Insurance and various auditors and other employees of the Department of Insurance of Illinois, under whose supervision defendant Lumbermens has operated since its inception, would have to be met.

This Court can judicially notice the accessibility of such persons and such records to the Illinois courts, as contrasted with the difficulties which will be met in connection with their production in the Eastern District awaiting trial, or call to testify, possibly to rebut some contention that may be abandoned or not even made.

11. Plaintiff, by reason of the class character of the action, is in a position where the only proof personally to [fol. 25] come from him is the establishment of his status as a policyholder. There can be no substantial harm or hardship to him in relegating him to his remedy before either the Federal or the State courts in Illinois, the state where all of the acts and transactions complained of took place. The granting of the instant application would not in any way deprive him of his day in court.

12. I respectfully urge to the Court the following additional considerations bearing on its exercise of discretion on this application:

(1) the cost to plaintiff of bringing this action is negligible, whereas the damage, expense and inconvenience to this defendant would be huge;

(2) plaintiff is but one of over 400,000 policyholders of Lumbermens, including holders of workmens compensation, boiler, plate glass and general insurance, as well as fidelity and surety bonds;

(3) plaintiff has never written to Lumbermens' Board of Directors or attended the meetings, regularly scheduled and held in Chicago each year, of the policyholders of Lumbermens for any purpose, let alone to file any protest, written or otherwise, concerning the matters now alleged in the complaint;

(4) plaintiff does not claim to have presented any of the grievances alleged either to the Department of Insurance in Illinois or to the Department of Insurance in New York, although the statutes of both states contemplate the filing of such complaints or inquiries by policyholders of insurance companies;

(5) the books, records, acts and all business transactions of Lumbermens are subject, in the interests of all policyholders, to examination and audit by the insurance authorities of every state in which it does [fol. 26] business and have in fact been examined and audited customarily every three years by the Department of Insurance of Illinois, as well as by other state insurance departments; and

(6) such examinations and audits are exhaustive, taking during the last ten years, from three to five months to complete.

I urge this Court to consider that, in passing upon the internal management and affairs of Lumbermens, it will be asked to apply not only Illinois corporate law in general, but the statutory provisions of the Insurance Law of said State, as interpreted by court decisions, as well as by rulings on the part of the Director of Insurance. Moreover, the application thereof will be required to be made to the numerous types of insurance coverage mentioned above, with separate and generally different rates of agency and brokerage commission or compensation applicable thereto.

I therefore respectfully ask that, in the exercise of a sound discretion, and after weighing the absence of hardship to plaintiff against the obvious damage to Lumber-

mens, this Court deny jurisdiction, without prejudice to a renewal of any or all of plaintiff's claims in a forum where he can have his day in court without loss to himself but with a minimum of inconvenience, expense, damage and difficulty to Lumbermens, whose interest he professes to espouse in bringing this lawsuit.

(S.) T. H. Gillespie.

Sworn to before me this 23 day of December, 1944. (S.) Clifford A. Kiracofe. My Commission Expires April 17, 1948. (Seal.)

(Clerk's certificate attached.)

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[fol. 27] In United States District Court

Affidavit of Stuart N. Updike in Support of Motion

Stuart N. Updike, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Townley, Updike & Carter, representing defendant (American) Lumbermens Mutual Casualty Company. This affidavit is made in support of a motion to dismiss plaintiff's complaint herein, without prejudice, upon the grounds

(1) that this Court in its discretion should not entertain jurisdiction over an action requiring it to interfere with and control the internal affairs of a foreign insurance corporation, to wit, defendant (American) Lumbermens Mutual Casualty Company; and

(2) that an indispensable party defendant has not been served.

As appears from the complaint herein, defendant James S. Kemper is included as a party defendant in each of the four causes of action therein alleged. In each cause of action, relief is sought against him and rights of his are sought to be adjudicated. On information and belief, defendant James S. Kemper has not been served with process in this action. On these facts, as appears from the accompanying memorandum of law, this Court will decline to take or retain jurisdiction, especially since there is a forum open to

[fol. 28] plaintiff where he can obtain jurisdiction over each of the defendants.

On information and belief, defendant James S. Kemper is now, and has been for more than thirty years, a citizen of the State of Illinois and resides in Winnetka, Illinois. I have no reason to believe that he will be in New York at any time in the next year or ten years.

As appears from the affidavit of T. H. Gillespie, sworn to December 23, 1944, submitted herewith, there are present in this action all of the factors which in the past have repeatedly induced courts to reject jurisdiction of controversies arising in a foreign state, involving the internal management and affairs of a foreign corporation. In addition to the difficulties presented in such cases as to corporations generally, the court would have the added burden of construing the Illinois Insurance Code and regulations issued thereunder by the Insurance Department of said state.

Moreover, no substantial prejudice to plaintiff is likely to arise by reason of the granting of the motion, since he is in no sense being deprived of his day in court. It is therefore respectfully prayed that an order be made dismissing the complaint herein without prejudice to a renewal of any or all of the alleged causes of action set forth in the complaint in such other forum as plaintiff may be advised.

Stuart N. Updike.

(Sworn to December 26, 1944.)

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[fol. 29] In District Court of the United States

Affidavit of William E. Haudek in Opposition to Motion

William E. Haudek, being duly sworn, deposes and says:

I am an attorney associated with Abraham L. Pomerantz, counsel for the plaintiff in the above entitled action. I submit this affidavit in opposition to the motion of defendant (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) to dismiss the action.

This action was commenced by the filing of the complaint on October 20, 1944. The summons and complaint herein have been duly served upon Lumbermens and upon defendant James S. Kemper & Co., Inc. The individual defendant James S. Kemper has not yet been served.

I am informed and verily believe that Mr. Kemper, who is a resident of Illinois, was in New York at or about the time this action was commenced. My information is based on newspaper statements, upon statements of Mr. Kemper's secretary and upon statements of the Clerk or other attendant of the Hotel Roosevelt at which Mr. Kemper was staying at that time. Despite strenuous efforts the United States Marshal and a process server appointed by this Court were unable to make service upon Mr. Kemper. Plaintiff proposes to make such service upon Mr. Kemper's next visit to New York.

A memorandum of law submitted herewith sets forth the grounds for which I respectfully submit the motion to dismiss should be denied.

William E. Haudek.

(Sworn to January 9, 1945.)

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[fol. 30] In United States District Court

Alfred Gurkin, Attorney for Plaintiff; Abraham L. Pomerantz and William E. Haudek, of Counsel.

Townley, Updike & Carter, Attorneys for (American) Lumbermens Mutual Casualty Company; Stuart N. Updike, of Counsel.

Opinion

Abruzzo, D. J.:

The plaintiff, a citizen of New York, residing in this District, sued the three defendants above named.

The Lumbermens Mutual Casualty Company is a mutual insurance company which was organized and exists under the laws of the state of Illinois.

James S. Kemper & Co., Inc., is a corporation organized under and by virtue of the laws of the State of Illinois; and James S. Kemper, the individual defendant, is a citizen and resident of Illinois.

The plaintiff alleges that since May, 1941, he has been and is now a member and policyholder of the Lumbermens Mutual Casualty Company and brings this action in the right and on behalf of all its members and policyholders.

The motion brought under Rules 12 (b) and 19 (a) of the Rules of Civil Procedure asserts (1) that this Court in its discretion should not entertain jurisdiction over an ac-

tion requiring it to interfere with and to control the internal affairs of a foreign insurance corporation; and (2) that plaintiff has failed to bring before the Court as a defendant, an indispensable party, to wit, James S. Kemper.

The first cause of action is against Lumbermens Mutual Casualty Company and the individual defendant, Kemper, and alleges that the defendant Kemper received from the Lumbermens Mutual Casualty Company an unwarranted increase in salary and other compensation which was without consideration and constituted a gift of corporate assets. [fol. 31] The second cause of action, against all three defendants, alleges that the individual defendant Kemper dominated and controlled the management, personnel and business policies of the defendant, James S. Kemper & Co., Inc.; and that the defendant, James S. Kemper & Co., Inc., received commissions, fees and other payments for services to the Lumbermen's Mutual Casualty Company which the Lumbermen's Mutual Casualty Company could have rendered just as efficiently for itself with its own employees; and seeks an accounting of all the profits derived by the James S. Kemper & Co., Inc., because of the action so complained of.

The third and fourth causes of action against the individual defendant Kemper and Lumbermens alleges that Kemper knowingly and wilfully caused Lumbermens at various times to sell shares of stock for a sum less than the true value of the security and, by reason of these sales, the Lumbermens sustained damages in excess of $1,112,050.

The complaint demands that Kemper and the Kemper corporation be required to account to the Lumbermens for all damages and profits alleged in the complaint; and that the plaintiff be awarded the costs and expenses of this action including counsel fees and accountant's fees.

James S. Kemper, a very necessary party, especially in the first cause of action, and in the third and fourth causes of action, has not been served and, unless he is found in this jurisdiction, never can be served. The first cause of action, therefore, will, unless service is effected, necessarily fall, as will the third and fourth causes of action. The second cause of action being against all three defendants can be tried but not against Kemper as an individual defendant. Under the first cause of action, the Lumbermens Mutual Casualty Company will receive no benefits unless a judg-

ment directs Kemper to account for his excess in compensation. The third and fourth causes of action would necessarily have to direct Kemper, the individual, to pay back [fol. 32] to Lumbermens a judgment up to and beyond the sum of $1,112,050. The second cause of action might possibly result in some benefit to the Lumbermens Mutual Casualty Company in the event it were tried.

Rule 12 (b) of the Rules of Civil Procedure permits defenses at the option of the pleader: (1) for lack of jurisdiction over the subject matter, (2) for lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, and (6) failure to state a claim upon which relief can be granted.

The affidavit of T. H. Gillespie, secretary of Lumbermens Mutual Casualty Company, in support of this motion makes the following allegations which I believe are pertinent to the issue involved:

Lumbermens does business in every one of the 48 states. It employs approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois, having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.

There will be involved in the trial of this action the transportation of large quantities of records from Chicago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses [fol. 33] when they come to this District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.

It is important to note at this point that this plaintiff apparently never attended any meetings of the Lumber-

mens policyholders, wrote or spoke any criticism of the conduct or affairs of the company, or ever indicated he had any protest or complaint to make either to the Director of Insurance of Illinois or the Superintendent of Insurance of New York, or the Lumbermens Mutual Casualty Company.

Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come.

The defendant contends that in the exercise of the Court's sound discretion it should decline jurisdiction and dismiss plaintiff's complaint without prejudice for renewal in the appropriate forum and, secondly, that the absence of an indispensable party defendant without whose presence the Court could render justice between the parties, preclude this Court from accepting jurisdiction.

The plaintiff does not deny he is a member and policyholder of Lumbermens. He contends that this is a derivative action brought by the plaintiff on behalf and for the benefit of the defendant, Lumbermens Mutual Casualty Company. He concedes under Point I of his brief that "It is elementary that the courts of one state * * * may in their discretion refuse to take jurisdiction of a suit involving the internal affairs of a foreign corporation." His contention is that this suit is not one involving the internal affairs of a foreign corporation but is a stockholder's derivative suit which seeks an accounting for corporate mismanagement and, as it does not involve the internal affairs of a foreign corporation, jurisdiction is mandatory. The plaintiff is not a stockholder—he is a policyholder.

[fol. 34] In support of this contention, plaintiff cites *Hirshhorn* v. *Mine Safety Appliances Co.*, 54 F. Supp. 588 (W. D. Pa.), which was an action for an accounting of profits from the use of patents. This case held that it was not an abusive discretion even if it involves the internal management of a foreign corporation, for a District Court to accept jurisdiction of such a case. In *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, the Supreme Court stated as follows (p. 131):

> Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal

> affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever consideration of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case.

*Overfield* v. *Pennroad Corporation*, 113 F. (2d) 6 (C. C. A. 3d), cited in support of plaintiff's contention is not in point for the reason that the plaintiff, who was a citizen and resident of the State of Utah, instituted suit in the Eastern District of Pennsylvania, basing federal jurisdiction upon diversity of citizenship. All of the individual defendants and directors of the defendant were citizens of Pennsylvania. The court properly accepted jurisdiction.

The *Rogers* case is authority for the settled doctrine that a court, state or federal, as a general rule will decline to interfere with the internal affairs of a corporation organized under the laws of another state, but will leave such controversies as to such matters to the courts of the state of domicile.

Our own Circuit Court of Appeals, on February 26, 1942, in the case of *Cohen* v. *American Window Glass Co.*, 126 F. [fol. 35] (2d) 111, reiterated the rule in the *Rogers* case and added (p. 114):

> • • • it seems proper to observe a definite trend away from decision of non-federal matters in federal courts except where jurisdiction is clear; • • •

It should be borne in mind too that there are regulatory statutes in Illinois and these statutes indicate that certain actions affecting the internal management of insurance companies organized under its laws must be maintained in the first instance by the Director of Insurance represented by the Attorney General. The decisions seem to indicate that upon a proper showing, if the Director of Insurance refuses to act, mandamus will lie to compel him to perform his statutory duty. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 56 N. E. (2d) 353 (Supreme Court, Illinois, 1944); *People ex rel. Barber* v. *Hargreaves*, 303 Ill. App. 387 (1940); *Micezey* v. *Missouri State Life Insurance Company*, 273 Ill. App. 281 (1934).

This may be of importance in view of the fact that the plaintiff has never communicated or made any complaint to the Insurance Department of the State of Illinois.

It is evident that the action involves the internal management of a foreign corporation, and it is apparent too that the consideration of convenience of witnesses and efficiency and justice demand that this Court refuse to entertain jurisdiction. The plaintiff and his lawyer it seems would be the only persons needed to prosecute this action in Illinois. Due to the number of witnesses that would necessarily have to be called by the defendant and the records introduced in evidence, all found in and around the City of Chicago, this supports the conclusion that the case should properly be tried in Illinois.

Kemper, the individual, is undoubtedly an indispensable party defendant and vitally necessary to support the alle-[fol. 36]gations in the complaint, especially the first cause of action, and the third and fourth causes of action. The defendant should not go to trial without that party having been served so as to be before the Court. *Shields* v. *Barrow*, 17 How. 130 (1855); *State of California* v. *Southern Pacific Co.*, 157 U. S. 229; *United States* v. *Washington Institute of Technology*, 138 F. (2d) 25 (C. C. A. 3d), referring to Rule 19 (a) of the Rules of Civil Procedure, stated. (p. 26):

> As described in the leading case upon the matter, they were persons who had such an interest that any final decree rendered had to affect that interest.

The opinion referred to the rule laid down in *Shields* v. *Barrow*, *supra*.

The Court could not justly render a judgment or a decree consistent with equity and good conscience unless Kemper was properly before this Court. This is especially true because Kemper is the sole defendant against whom relief is sought in the first, third and fourth causes of action, and his right, expressions, and duties are inseparable from those of James S. Kemper & Co., Inc., his co-defendant in the second cause of action.

There may be some justice to the contention of the defendant that as the action is only at issue for three months it is conceivable that Kemper might be served. On the other hand, if he were not served when the action came be-

fore the Court for trial and, if an order were not made by me, it is conceivable that the case would be pressed to trial without Kemper and the defendant thereby would lose the value of its rights. Under these circumstances, it would be perfectly proper for this Court to direct an order to be entered staying the trial of the second cause of action until Kemper was served. That direction does not seem to be necessary in view of my conclusion that the action [fol. 37] should be dismissed because the suit relates to the internal affairs of a foreign corporation and that the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case.

Enter an order in accordance with this decision on notice.

M. T. Abruzzo, U. S. D. J.

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In United States District Court, Eastern District of New York

Order Appealed From—Filed February 7, 1945

Defendant (American) Lumbermens Mutual Casualty Company having duly moved this Court for an order dismissing the complaint herein on the ground that this Court, in its discretion, should not entertain jurisdiction over an action requiring it to interfere with and control the internal affairs of a foreign insurance corporation, and on the further ground that an indispensable party defendant has not been served, and said motion having come on to be heard before this Court on the 10th day of January, 1945 and Townley, Updike & Carter, Esqs. (Stuart N. Updike of counsel) having appeared in support of said motion and Alfred Gurkin, Esq. (Abraham Pomerantz and William E. Haudek, Esqs. of counsel) having appeared in opposition thereto,

[fol. 38] On reading and filing the notice of motion dated December 27, 1944, the summons and complaint herein verified October 9, 1944, the affidavits of T. H. Gillespie sworn to December 23, 1944 and of Stuart N. Updike sworn to December 26, 1944 in support of said motion, and the affidavit of William E. Haudek sworn to January 9, 1945 in opposition thereto,

Now, upon motion of Townley, Updike & Carter, attorneys for defendant (American) Lumbermens Mutual Casualty Company, and the opinion of Judge M. T. Abruzzo, dated January 30, 1945, and due deliberation having been had, it is hereby

Ordered, that said motion to dismiss said complaint be and the same hereby is granted in all respects and the complaint be and the same hereby is dismissed without prejudice.

M. T. A., U. S. D. J.

[File endorsement omitted.]

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[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that Eugene Koster, the Plaintiff herein, appeals to the United States Circuit Court of Appeals for the Second Circuit from the order and judgment herein, filed February 7, 1945, dismissing the complaint.

Dated: New York, April 24th, 1945.

Alfred Gurkin, Attorney for Plaintiff, Office & P. O. Address, 152 West 42nd Street, Borough of Manhattan, New York 18, N. Y.

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[fol. 40] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of the United States District Court for the Eastern District of New York in the above entitled matter, as agreed upon by the parties.

Dated, New York, August 29, 1945.

Alfred Gurkin, Attorney for Appellant; Townley, Updike & Carter, Attorneys for Appellee.

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[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 86

(Argued November 8, 1945. Decided February 4, 1946)

Docket No. 19927

EUGENE KOSTER, Appellant,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee,

and

JAMES S. KEMPER and JAMES S. KEMPER & CO., INC., Defendants

Before Swan, Chase and Clark, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Derivative action by a policy holder in a mutual insurance company to require one of its directors and another defendant to account to it for diverting assets. From a judgment dismissing the complaint without prejudice to suit in a different forum, the plaintiff appeals.

[fol. 43] Alfred Gurkin, Attorney for appellant; Abraham L. Pomerantz and William E. Haudek, of counsel.

Townley, Updike & Carter, Attorneys for appellee; Stuart N. Updike, of counsel.

SWAN, Circuit Judge:

This is a derivative action brought in the federal court on the ground of diverse citizenship. The plaintiff, a resident of the Eastern District of New York, is the holder of an automobile liability policy issued by (American) Lumbermens Mutual Casualty Company, a mutual insurance company organized under the laws of Illinois and licensed to do business in New York. For brevity the company will hereafter be called Lumbermens. The other

defendants are James S. Kemper, who resides in Illinois and is an officer and director of Lumbermens, and James S. Kemper & Co., an Illinois corporation controlled by Mr. Kemper. In the right of Lumbermens and on behalf of all its policy holders, the plaintiff's complaint charges Kemper and the Kemper company with diversion of Lumbermens' assets and asks that they account to it for profits and damages. There are four causes of action pleaded: the first charges that Kemper dominated Lumbermens and caused it pay him excessive salary for which he gave no consideration; the second charges that he caused Lumbermens to pay the Kemper company unwarranted commissions and fees; the third and fourth charge that he caused Lumbermens to sell to him and other persons allied with him various securities at less than their value. Lumbermens moved to dismiss the complaint on the ground of (1) forum non conveniens, and (2) absence of an indispensable party, James S. Kemper not having been served. The [fol. 44] motion was granted and the complaint was dismissed without prejudice. The plaintiff has appealed

Since James S. Kemper is the only defendant against whom relief is sought in counts one, three and four, it is obvious that the causes of action alleged in those counts cannot proceed to trial unless Mr. Kemper can be served within the jurisdiction of the court. But it would have been premature to dismiss the complaint for lack of service on him during the two months which intervened between the filing of the complaint and the Lumbermens' motion to dismiss.[1] Moreover Mr. Kemper was not an indispensable party to the cause of action asserted in count two against Kemper & Co. Its liability rests upon participation in the alleged wrongdoing of Kemper as a fiduciary of Lumbermens, and there is no reason why such liability cannot be tried without Kemper's presence as a party. Therefore dismissal could not properly be rested on the absence of an indispensable party, nor was it. The motion was granted because, as stated in the district court's opinion, "the suit relates to the internal affairs of a foreign corporation" and

[1] Rule 1 of the civil rules of the District Court for the Eastern District of New York allows one year from the filing of the complaint to make service. Cf. *Hackner v. Guaranty Trust Company*, 117 F. 2d 95 at 99 (C. C. A. 2).

"the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." Hence the question presented for decision by this appeal is whether the doctrine of *forum non conveniens* justified dismissal of the action.

The appellant relies upon the rule that where jurisdiction is conferred on a federal court its exercise of juris- [fol. 45] diction is mandatory, and only in exceptional cases of a steretyped character has the court discretion to decline it. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234; *Williams* v. *Green Bay & Western R. R. Co.*, — U. S. — (Jan. 7, 1946); *Griffith* v. *Bank of New York*, 147 F. 2d 899, 904 (C. C. A. 2). Controversies which involve interference with the internal affairs of a foreign corporation fall within one of the well recognized exceptions. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *Weiss* v. *Routh*, 149 F. 2d 193 (C. C. A. 2). But as Mr. Justice Douglas pointed out in the recent *Williams* case, *supra*, where only a money judgment is sought, the court will normally entertain jurisdiction, even though internal affairs are in some sense involved. In the case at bar, the insurance company is nominally a defendant but in essence is the plaintiff in an action which seeks an accounting for the waste and diversion of corporate assets by a faithless director and (in count two) by a corporation alleged to have participated in the fiduciary's wrongdoing. Inquiry into the conduct of the directors of the insurance company will be required but no such supervision into its internal affairs as to make the courts of Illinois a more appropriate forum than those of New York. Consequently, assuming for the moment that the plaintiff as a policy holder in a mutual company has the same right as would a shareholder in a stock company to bring a derivative action on the corporation's behalf, the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation.[2]

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[2] While a federal court is not bound to follow state cases in respect to discretionary declination of jurisdiction—*Gilbert* v. *Gulf Oil Corporation* (C. C. A. 2, January 4, 1946)—it is interesting to note that the New York courts would not

[fol. 46] The parties are in dispute as to whether a policy holder has the same standing as a stockholder to bring a derivative action against a faithless fiduciary. The plaintiff asserts that the answer to this question depends upon the law of New York. We think not. Whether a person is a shareholder or other member of a corporation is determined by the law of the state of incorporation. *Gallup* v. *Caldwell*, 120 F. 2d 90, 93 (C. C. A. 3); A. L. I. Restatement of Conflict of Laws, § 182. And the rights of a policy holder in a mutual company to bring a derivative action are likewise governed by the terms of his contract under the law of the company's domicile. *Haynes* v. *Fraternal Aid Union*, 34 F. 2d 305 (D. C. Kans.). The law of Illinois on this point is not wholly clear. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 387 Ill. 393, *cert. den.*, — U. S. —, is relied upon by the appellee as indicating that a policy holder cannot bring a derivative action. That case was distinguished, however, in *Winger* v. *Chicago City Bank & Trust Co.*, 60 N. E. (2d) 560, 570 (Ill. App.) which sustained a derivative suit for the recovery of assets. In reason we see no valid distinction between a stockholder's and a policy holder's derivative suit seeking relief of this character. As we said in *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 425, "A shareholder's suit in essence is nothing more than a suit by a beneficiary of a fiduciary to enforce a right running to the fiduciary as such." With respect to its cause of action against a faithless director, the company is a trustee for the policy holders who will benefit by its recovery of diverted assets. Even if there were more doubt than appears to us as to the plaintiffs' right under Illinois law to sue on behalf of the company, such doubt "is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." *Williams* v. *Green Bay & Western R. R. Co.*, *supra*.

[fol. 47] Nor can non-exercise of federal jurisdiction be rested, in our opinion, on the theory that the court's action might interfere with the functioning of the state administrative agency which supervises insurance companies. For

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have declined jurisdiction had this been a derivative suit by a shareholder in a stock corporation. *Miller* v. *Quincy*, 179 N. Y. 294; *Ernst* v. *Rutherford B. S. G. Co.*, 38 App. Div. 388; *Goldstein* v. *Lightner*, 266 App. Div. 357, aff'd 292 N. Y. 670.

reasons stated in the *Winger* case, *supra*, the type of relief sought will not so interfere.

The issue really comes down to whether maintenance of the suit in New York will be so vexatious or oppressive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." See *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131. On this issue the district court's opinion mentions as pertinent considerations the following facts derived from an affidavit by Lumbermens' secretary:

> "Lumbermens does business in every one of the 48 states. It employs approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.
>
> There will be involved in the trial of this action the transportation of large quantities of records from Chi- [fol. 48] cago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses when they come to ths District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.
>
> . . . . . .
>
> Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come."

The secretary's affidavit also states that the plaintiff became a policy holder in May 1941 and since that date has paid to Lumbermens total premiums of less than $250; and if plaintiff were entirely successful in his suit the net effect of the recovery by Lumbermens upon plaintiff's interest in the company would be an increase, negligible in amount, in the dividends applicable to his policy. None of the foregoing facts was controverted by the plaintiff. He relied solely on the legal proposition that the exercise of jurisdiction was mandatory. In that he is in error. The last paragraph of the opinion in the *Williams* case, *supra*, implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, "whether the availability of witnesses or any other aspect of a trial be considered." The decision of this court in *Gilbert* v. *Gulf Oil Corporation*, handed down herewith, is to the same effect. Hence we think that the district court had discretion to decline jurisdiction, and on [fol. 49] the undisputed facts no abuse of discretion has been made to appear. See *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. On that ground the judgment is affirmed.

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CLARK, Circuit Judge (dissenting):

*Williams* v. *Green Bay & Western R. Co.*, S. Ct., Jan. 7, 1946, reversed the exercise of discretion by the trial court, D. C. S. D. N. Y., 59 F. Supp. 98, affirmed by this court, 2 Cir., 147 F. 2d 777, to restrict the doctrine of *forum non conveniens* in narrow limits in cases claimed to involve interference with the internal affairs of a foreign corporation. While doing so, it clearly implied further disapproval of the reaches of *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, decided by a divided court and ever since the subject of critical comment. *Cf. Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111; 113, 114; Frank, *J.*, dissenting in the *Williams* case, 2 Cir., 147 F. 2d 777, 781. The *Williams* case cannot therefore serve as authority for an extension of the doctrine admittedly going beyond that recognized even in the locale most hospitable to it, New York; indeed, quite the contrary.

As we pointed out in *Gilbert* v. *Gulf Oil Corp.*, 2 Cir., Feb. 4, 1946—another attempt to extend the doctrine even

beyond the New York precedents—it seems a serious thing for federal judges of their own initiative to introduce a limitation of the authorized diversity jurisdiction of the federal courts to that district only where most of the witnesses seem likely to be. It may well be a matter of interest to Congress, as in the proposed revision of the Judicial Code which now purports both to *extend* the venue of actions against foreign corporations and to grant a discretionary power of transfer "for the convenience of parties and [fol. 50] witnesses." *Gilbert* v. *Gulf Oil Corp., supra.* But it is another thing for a court to say to a plaintiff that even though Congress has specifically provided that you may sue a defendant duly served in your home district, 28 U. S. C. A. § 112, you may not do so if it will inconvenience your adversary. And even the legislative body may hesitate to change the existing statutes upon examining some of the grounds here relied on for a denial of jurisdiction: the small amount of the plaintiff's investment, the supposed lack of hotel accommodations in this metropolitan area, the fact that defendant, like most large corporations today, does business and can be sued in many federal districts, and that it is a large corporation at its home base. Such considerations might lead legislators to think that the usually assigned reason for this jurisdiction, the avoidance of local prejudice, has still a sphere of operation.

To date the operation of the doctrine of refusal of jurisdiction otherwise granted seems to have been limited in the federal courts to the case of supervision of a corporation, noted above, and the quite special admiralty doctrine of refusing adjudication of claims between "foreigners" (real foreign litigants, not merely citizens of another state). *The Belgenland,* 114 U. S. 355; *Charter Shipping Co.* v. *Bowring, Jones & Tidy,* 281 U. S. 515. And perhaps there is still open the question which troubled us in *Gilbert* v. *Gulf Oil Corp., supra,* namely, whether we should take over the special New York rule applied there in personal injury and death damage cases. This represents a great extension of the rule beyond anything I have been able to discover. If it is to be done at all, it should be in an unusually "vexatious or oppressive" case, as the terms were used in *Williams* v. *Green Bay & Western R. Co., supra.* — S. Ct. —, —. But [fol. 51] this case, like the *Gilbert* case, illustrates the quite natural, indeed human, tendency of the district court to accept vague generalities as an excuse for avoiding a perhaps

protracted litigation. Outside of the considerations mentioned above, which are surely immaterial, if not prejudicial to a fair examination of the point, the only ground seems to be the contention of the Casualty Company (the real beneficiary of the action, albeit the only moving party here) that it has many record books, as well as officers, located in Chicago. As I try to pierce these generalities, I find very little; indeed, it seems likely that the records can and should be summarized in written form and that the case may turn upon issues of law upon agreed or undisputed facts as to the employment of the company's president and of his separate company for unusual remuneration and commissions. Outside of his own testimony, which it probably lies in his power to limit to a deposition if he so chooses, F. R. 26(d), the amount of oral testimony and of disputed evidence of any sort seems limited. I question the power and policy involved in introducing into the law a limitation upon federal jurisdiction of this kind, and certainly of doing so upon the basis of such vague and general affidavits as these.

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[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Defendants

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Defendants

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 53] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Eugene Koster v. (American) Lumbermens Mutual Casualty Company, James S. Kemper, etc. 86. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 4, 1946. A. M. Bell, Clerk.

[fol. 54-70] Petition for rehearing covering 13 pages filed Feb. 26, 1946 omitted from this print. It was denied, and nothing more by order of March 18, 1946.

[fol. 71] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE KOSTER, Appellant,

vs.

(American) LUMBERMENS MUTUAL CASUALTY COMPANY, Appellee,

and

JAMES S. KEMPER and JAMES S. KEMPER & CO., INC., Defendants

Before Swan, Chase and Clark, Circuit Judges

PETITION FOR REHEARING

Alfred Gurkin, Attorney for Appellant; Abraham L. Pomerantz and William E. Haudek, of Counsel

Per CURIAM:

Petition denied.

T. W. S., H. B. C., C. E. C., C. JJ.

Filed March 18, 1946.

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[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of March, one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

EUGENE KOSTER, Plaintiff-Appellant,

v.

(American) LUMBERMENS MUTUAL CASUALTY COMPANY, Defendant-Appellee; James S. Kemper and James S. Kemper & Co., Inc., Defendants

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk, by (S.) A. Daniel Fusaro, Deputy Clerk.

[fol. 73] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Eugene Koster v. American Lumbermens Mutual Casualty Company, et al. Order. United States Circuit Court of Appeals, Second Circuit. Filed March 18, 1946. Alexander M. Bell, Clerk.

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[fol. 74] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 75] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket and assigned for argument immediately following No. 93, Gulf Oil Corporation vs. Gilbert.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[fol. 76] Endorsed on Cover: File No. 51070. U. S. Circuit Court of Appeals, Second Circuit. Term No. 206. Eugene Koster, Petitioner, vs. (American) Lumbermens Mutual Casualty Company. Petition for writ of certiorari and exhibit thereto. Filed June 17, 1946. Term No. 206 O. T. 1946.

FILE COPY

N. 206

JUN 17 1940
CHARLES ELMORE CROPLEY

# Supreme Court of the United States

OCTOBER TERM 1939

EUGENE KOSTER,

*Petitioner,*

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

MILTON POLLACK,
*Attorney for Petitioner.*

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# Supreme Court of the United States

**OCTOBER TERM 1945**

EUGENE KOSTER,
Petitioner,
against
(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

*To the Supreme Court of the United States and to the Honorable the Chief Justice and the Justices thereof:*

The petition of plaintiff, Eugene Koster, for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit respectfully shows to this Court:

### A

### Jurisdiction.

The jurisdiction of the District Court rests on diversity of citizenship, § 24 of the Judicial Code, 28 U. S. C. § 41. The jurisdiction of this Court rests upon § 240 of the Judicial Code, 28 U. S. C. § 347. The Circuit Court filed its judgment of affirmance on February 4, 1946 (R. 49-50). On February 21, 1946, petitioner moved for a rehearing (R. 55) which the Circuit Court, upon consideration thereof, denied on March 18, 1946 (R. 68-69).

## B

## Opinions Below

The opinion of the District Court for Eastern New York (R. 30), by Abruzzo, D. J., is reported 64 F. Supp. 595.

The opinion of the Circuit Court (R. 42), by Swan and Chase, C. JJ., is reported 153 F. 2d 888. Clark, C.J., dissented in a separate opinion (153 F. 2d 891).

## C

## Summary Statement of the Matter Involved

Petitioner asks this Court to review the Circuit Court's affirmance (R. 49-50) of the final order of the District Court for Eastern New York dismissing the action on the ground that it was brought in a *forum non conveniens* (R. 37). A review is also sought of the Circuit Court's denial of rehearing (R. 68-69).

### 1. Character of the action

This is a derivative suit for a money judgment brought by petitioner as plaintiff on behalf and for the benefit of defendant-respondent (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) (R. 4).

Lumbermens is a mutual insurance company organized in Illinois, licensed to do and doing business in New York (R. 20). Petitioner, a citizen of New York and a resident of its Eastern District (R. 3), has been since May, 1941, and now is a member and policy holder of Lumbermens (R. 4).

Lumbermens is only a formal or nominal defendant. The real defendants are James S. Kemper, the President, Manager and Chairman of the Board of Lumbermens (R. 4), and James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), an Illinois corporation (R. 3-4) controlled by Kemper and his family (R. 6-7).

The complaint (R. 3) charges Kemper with the waste and diversion of Lumbermens' assets. Kemper caused Lumbermens to pay him excessive salary and other compensation for 1942 (first cause of action); to pay unwarranted commissions and fees to Kemper & Co. (second cause of action); and to sell to him, and to persons allied with him, substantial amounts of securities at prices well below their value (third and fourth causes of action).

The complaint prays that Kemper and Kemper & Co. be directed to account to Lumbermens for its damages and for their profits (R. 14).

**2. Lumbermens' motion to dismiss**

Lumbermens, for whose benefit this action is brought, moved to dismiss it on two grounds: (1) *forum non conveniens;* and (2) absence of an indispensable party defendant (R. 18). The second ground of motion was overruled by the Circuit Court (R. 43) and will not again be referred to herein.

Lumbermens' motion did not question federal jurisdiction or the propriety of venue. Diversity of citizenship and a $3,000 amount in controversy are alleged (R. 3-4) and undisputed. The venue, laid in the district of petitioner's residence (R. 3), complies with § 51 of the Judicial Code, 28 U. S. C. § 112.

But Lumbermens contended that the District Court, in the exercise of its discretion, should decline jurisdiction because this suit involves its internal affairs which can more conveniently be adjudicated in Illinois, the state of its incorporation, than in New York (R. 19-26). In support of the plea of inconvenience Lumbermens stated that its head office is in Chicago; five of its seven directors, most of its officers and more than one-third of its employees reside in Illinois; its general business records are kept there; most of the witnesses and records necessary for the trial would have to be brought from Chicago to New York with consequent expense, loss of time and inconvenience

(R. 32-33, 46). By contrast, it was contended that petitioner's proportionate individual interest in the recovery would be negligible and that trial of the action in Illinois would put him to no substantial inconvenience (R. 20, 23-25, 47).

Lumbermens further argued that the action involves difficult problems of Illinois law which could more efficiently be determined by the courts of that state, including the question whether petitioner is barred from access to the courts by a provision of the Illinois Insurance Code allegedly requiring him to address his complaint to the Director of Insurance of Illinois (R. 25, 26, 35).

**3. The decisions below.**

(a) *The District Court's decision* (R. 30): The District Court held that the action involves the internal affairs of Lumbermens and that the difficulty of bringing witnesses and records from Chicago to New York and the necessity of deciding difficult questions of Illinois law make Illinois the most appropriate forum.

(b) *The Circuit Court's majority decision* (R. 42): The Circuit Court, in affirming this decision, held:

1. This action does not involve the internal affairs of Lumbermens since it seeks only a money judgment (referring to *Williams* v. *Green Bay & Western R. Co.*, 66 S. Ct. 284 [1946]) (R. 44).

2. Had this action been brought in the New York State courts, jurisdiction would be mandatory (R. 44-45, n.2).

3. Under the law of Illinois, petitioner is entitled to maintain this action and is not relegated to his remedy before the Illinois Director of Insurance (R. 45-46).

4. Nevertheless, the action must be dismissed because the District Court, without abuse of discretion, found the suit "so vexatious or oppressive that 'con-

siderations of convenience, efficiency and justice point to the courts of the state of the domicile as appropriate tribunals'" (referring to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131, and to the *Williams* case, *supra*) (R. 47).

(c) *Judge Clark's dissent* (R. 47): Judge Clark thought that *Williams* v. *Green Bay & Western R. Co.*, *supra*, 66 S. Ct. 284, restricted rather than extended the scope of the *forum non conveniens* rule. That rule, theretofore limited to cases involving the internal affairs of foreign corporations and to certain admiralty controversies, should not be extended to actions seeking merely a money judgment. The mere inconvenience of the chosen forum to the defendant and to witnesses is not enough to render the suit vexatious or oppressive.

## D

## The Questions Presented to This Court

The precise question before this Court is:

> Has the District Court, in a diversity case, discretion to relegate the action to another forum for reasons of "convenience, efficiency and justice", where the suit seeks only a money judgment, is brought in the district of the plaintiff's residence and where, upon identical facts, the jurisdiction of the state courts would be mandatory?

The answer depends on a number of subsidiary questions:

> 1. Is the plaintiff's statutory right in a diversity case to lay the venue, in a money action, in the district of his residence subject to the limitation that the choice of forum must not be vexatious or oppressive?

Assuming that the statutory choice of forum is subject to such a limitation, the question arises:

2. Is inconvenience to the defendant and to witnesses a sufficient ground to render the statutory choice of forum "vexatious or oppressive"?

Assuming an affirmative answer, the last question is:

3. Has a district court, in a diversity case, discretion to decline jurisdiction where, upon identical facts, the jurisdiction of the state courts would be mandatory?

This question was expressly reserved in *Williams* v. *Green Bay & Western R. Co., supra.* It is now squarely presented since the Circuit Court has held that the New York courts in similar cases do not decline jurisdiction (R. 44-45, n.2).

## E

## Grounds for Granting the Writ of Certiorari

1. The decision below constitutes a far-reaching innovation in the law of federal jurisdiction and venue. Concededly, the action does not involve the internal affairs of a foreign corporation, but seeks only a money judgment (R. 44). If the Circuit Court's decision were permitted to stand, a district court might, for considerations of "convenience, efficiency and justice", decline jurisdiction even of a simple breach of contract action, on the theory that it is "vexatious or oppressive".

Such has never been the law. We propose to show that the Circuit Court's decision is in conflict with *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at 54 (1941); *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519, 521 (1934, per Cardozo, J.); and *Williams* v. *Green Bay & Western R. Co., supra*, 66 S. Ct. 284.

2. The serious doubts surrounding the true import of *Williams* v. *Green Bay & Western R. Co., supra,* are reflected by the Circuit Court's decision herein and in *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883 (C. C. A. 2, 1946), cert. granted May 20, 1946. In the latter case, Judges Clark and Frank held that the *Williams* case limits the doctrine of *forum non conveniens* to cases involving internal corporate affairs (153 F. 2d, at 885, 886). Extension of the doctrine beyond these confines, they thought, would cut "so deeply into traditional notions about the jurisdiction of the federal courts" as to make it "difficult to believe that the Supreme Court meant to go so far" (p. 886). But Judges Swan and Chase (in the case at bar) and Judge A. N. Hand (dissenting in the *Gilbert* case) read the *Williams* case as requiring that very extension of the doctrine.

Judges Clark and Frank further held that, even if the doctrine of *forum non conveniens* were extended to cases other than those involving internal corporate affairs, a choice of forum cannot be held "vexatious or oppressive" on the mere ground of inconvenience to the defendant and to witnesses. But again Judges Swan, Chase and A. N. Hand drew different conclusions from the *Williams* case.

The conflict among the Circuit judges, the doubts surrounding the scope of the *Williams* case, and the questions relating to the mandatory or discretionary character of federal jurisdiction and venue are thus such as to call urgently for final settlement by this Court.

This Court recognized the need by granting certiorari in *Gilbert* v. *Gulf Oil Co., supra.*. The problems raised by the instant case, while related to those in the *Gilbert* case, are sufficiently different to call for review by this Court of the case at bar along with *Gilbert* v. *Gulf Oil Co., supra.*

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

MILTON POLLACK,
Attorney for Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

EUGENE KOSTER, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the within petition and knows the contents thereof; that the same is true to his own knowledge, except as to those matters therein stated upon information and belief, and that as to those matters he believes it to be true.

EUGENE KOSTER.

Sworn to before me this
13th day of June, 1946.

ETHEL RADIN,
Notary Public, Kings County,
Kings Co. Clk. No. 72, Reg. No. 108-R-8
N. Y. Co. Clk. No. 678, Reg. No. 212-R-8
Commission Expires March 30, 1948

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### POINT I

**In a diversity action for a money judgment the plaintiff has an absolute right to sue in the district of his residence.**

1. The rule that federal jurisdiction and venue, once their statutory requirements are met, are mandatory goes back to *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, at 404 (1821), and has been consistently followed, *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, at 54 (1941); *Meredith* v. *Winter Haven*, 320 U. S. 228, at 234 (1943). The rule, to be sure, is subject to qualifications giving the court discretion to decline jurisdiction in favor of a more appropriate forum, *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, at 423 (1932). But the qualifications are only *"applicable to particular classes of cases"*, *Massachusetts* v. *Missouri*, 308 U. S. 1, at 19 (1939), or where "exceptional circumstances *of a stereotyped nature*" intervene, *Griffith* v. *Bank of New York*, 147 F. 2d 899, at 904 (C. C. A. 2, 1945).

The "particular classes of cases" to which the doctrine of *forum non conveniens* thus is limited include suits involving the internal affairs of foreign corporations, *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, at 131 (1933); admiralty suits among aliens, *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, 285 U. S., at 421; and other stereotyped categories enumerated in *Meredith* v. *Winter Haven*, *supra*, 320 U. S., at 235. Only where an action falls into one of these circumscribed categories has the District Court discretion to decline jurisdiction in favor of a more convenient and efficient forum; whereas in actions not con-

forming to any of these peculiar types the general rule of mandatory jurisdiction prevails.

The present suit seeks only a money judgment. In the light of *Williams v. Green Bay & Western R. Co.*, 66 S. Ct. 284 (1946), it does not, therefore, involve the internal affairs of a foreign corporation. And the action clearly fits none of the other "particular classes of cases" in which jurisdiction is discretionary.

It would seem to follow that the District Court's jurisdiction herein was mandatory and that the District Court was without power to relegate petitioner to another forum. The Circuit Court, however, invoking the *Williams* case, *supra*, vindicated such power on the premise that the institution of this suit in New York is "vexatious or oppressive".

2. The *Williams* case, we submit, does not sustain the decision below. The *Williams* action had been dismissed by the Circuit Court as involving the internal affairs of a foreign corporation (147 F. 2d 777). But even an internal affairs suit may be dismissed only if "considerations of convenience, efficiency and justice" point to the domicile of the corporation as the more appropriate forum. This Court, therefore, in reversing the Circuit Court, relied on two separate grounds: The *Williams* suit was not an internal affairs action; and, in any event, the plaintiff's choice of the New York forum was neither vexatious nor oppressive (see the last paragraph of the opinion).

The latter ground was clearly appropriate to the decision of a case which was claimed to involve the internal affairs of a foreign corporation. But there is nothing in the *Williams* opinion to suggest that a finding of "vexatious or oppressive" would justify the dismissal of a suit not falling into any of the "particular classes of cases" to which the doctrine of *forum non conveniens* has heretofore been confined. This Court, we believe, would have used different language had it intended to extend the doctrine

of *forum non conveniens*, beyond its traditional limits, to simple actions such as one for breach of contract or for an accounting by an unfaithful fiduciary. The historical background of the rule of "vexatious and oppressive" and our venue legislation clearly forbid such extension.

3. A careful scrutiny of the authorities in this country has failed to disclose a single precedent—outside the traditional scope of the *forum non conveniens* doctrine—in which jurisdiction was declined on the ground that the selection of forum was vexatious or oppressive. Such ardent advocates of the doctrine of *forum non conveniens* as Blair (*The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1), Foster (*Place of Trial in Civil Actions*, 43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41) and Dainow (*The Inappropriate Forum*, 29 Ill. L. Rev. 867) cite not one American decision applying the rule of "vexatious or oppressive". This Court in the *Williams* case, *supra*, cites only two authorities: A Scottish decision, *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, (1926) Sess. Cas. 13 (H. L.); and *Gibb, International Law of Jurisdiction* (1926), pp. 212, 213.

4. Scottish cases are not too helpful as authorities in this country. Scotland has adopted the civil law rule of *actor sequitur forum rei*—the plaintiff must sue in the forum of the defendant; *Williamson* v. *North Eastern Ry. Co.*, 11 Rettie (Sess. Cas., 4th Ser.) 596, at 598 (1884). That principle necessarily colors those Scottish decisions which apply the rule of *forum non conveniens*; see *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, *supra*, (1926) Sess. Cas., at 21. The rule *actor sequitur forum rei* fits ill into our common law system of jurisprudence which recognizes "the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him"; *Netograph Mfg. Co.* v. *Scrughan*, 197

N. Y. 377, at 380 (1910). Both Scottish and English courts have emphasized, therefore, that Scottish law carries the doctrine of *forum non conveniens* much further than England; *Ewing* v. *Orr Ewing*, (1885) 10 App. Cas. 453, at 506 (H. L.); *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, at 149.

5. More pertinent are the English authorities cited by *Gibb*. Their rule is that jurisdiction may be declined only if the plaintiff is a non-resident of England and has selected the English forum in bad faith, with the sole intent of harassing the defendant; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141; *Egbert* v. *Short*, (1907) 2 Ch. 205; *In re Norton's Settlement*, (1908) 1 Ch. 471. The last cited case, summing up the earlier law, holds:

> "• • • in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country" (p. 479).
>
> "• • • Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would practically be compelled to settle the action on the terms of the solicitors' letter which I have already referred to.
>
> "I have gone into the matter at this length in order to make it quite clear that questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings" (p. 482).

Similarly in *Egbert* v. *Short*, *supra*, (1907) 2 Ch., at 214:

> "She (plaintiff) is not resident in England in the proper sense of the term. * * * this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled".

6. No American case has been found applying the test of "vexatious or oppressive" to a suit in a federal court (or, for that matter, in any state court). The reason is obvious: The choice of a federal forum is limited, in this country, by the statutory rules of venue. In enacting those rules, and in limiting the forum of diversity suits to the residence of the plaintiff or the defendant (§ 51 of the Judicial Code, 28 U. S. C. § 112), Congress gave effect to the very considerations which moved the English Courts to decline jurisdiction of vexatious or oppressive litigations. The fluid English rule was thus replaced by one more rigid, to be sure, but also more certain in its application. The purposes of the two systems are the same; but they are achieved by different methods. To engraft the English rule of judicial discretion on ours, which is aimed at certainty, would defeat the purposes of Congress, defy the absolute terms of the venue statute and abruptly terminate a wholesome tradition of more than 150 years.

This Court has plainly held that grounds of inconvenience or expense cannot frustrate the statutory choice of venue. In *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941), this Court construed § 6 of the Federal Employers' Liability Act under which an action "may be brought" in any one of several specified districts. This Court held that the plaintiff had an absolute choice of venue regardless of inconvenience and expense to the defendant resulting from the necessity of bringing remote witnesses into the jurisdiction:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative . . . Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York" (314 U. S., at 54).

Both the plaintiff and the defendant in the *Kepner* case were residents of Ohio; the accident had occurred there; and approximately twenty-five witnesses resided near the place of the accident who could be transported only at considerable cost to New York where Kepner had brought his suit. Nevertheless, this Court rejected the railroad's contention that the prosecution of the suit in New York would be "an unreasonable, improper and inequitable burden" upon it (314 U. S., at 48).

There is no distinction in principle between the special venue under § 6 of the Federal Employers' Liability Act and the general venue under § 51 of the Judicial Code. The Court below so recognized; *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883, at 885 (C. C. A. 2, 1946).

It is true that an apparent exception to the plaintiff's absolute choice of venue is made in suits involving the internal affairs of a foreign corporation. But that exception is more nearly one of "substantive law—that of corporate supervision", *Gilbert* v. *Gulf Oil Co., supra*, 153 F. 2d, at 885; it cannot serve, therefore, to refute the broad *procedural* rule that even under the general venue statute the plaintiff has an absolute choice of suing in any proper district, regardless of inconvenience and cost resulting to the defendant.

We submit, therefore, that petitioner has an absolute right to maintain this suit in the Eastern District of New York, the district of his residence, and that the rule of "vexatious or oppressive" cannot be invoked to defeat his choice.

## POINT II

**Mere inconvenience to parties and witnesses does not render a choice of forum "vexatious or oppressive".**

Assuming, *arguendo*, that an action, even though brought in the proper venue, may be dismissed as "vexatious or oppressive", we submit that the facts at bar do not justify dismissal.

1. The Court below held that the District Court had discretion to decline jurisdiction and that, unless abused, the exercise of such discretion cannot be reviewed on appeal (R. 47). However, the District Court's exercise of discretion was affected by such errors of law as necessarily destroyed its conclusiveness upon an appellate court. In rejecting jurisdiction, the District Court relied on a congeries of reasons. At least two of them were clearly erroneous. The District Court held that "the suit relates to the internal affairs of a foreign corporation" (R. 35, 37); the Circuit Court recognized that it does not (R. 44). The District Court held that petitioner's remedy was with the Director of Insurance of Illinois (R. 35); the Circuit Court ruled otherwise (R. 45-46). Since these erroneous views of the law may have seriously influenced the District Court's exercise of discretion, the appellate court is not concluded by it.

But the District Court's decision is even more fatally defective. The District Court merely held that "the convenience of witnesses and efficiency and justice" point to Illinois as the proper forum (R. 37). This would have been enough on the District Court's premise that the suit involves the internal affairs of an Illinois corporation, *Rogers v. Guaranty Trust Co., supra*, 288 U. S., at 131. But this suit is not an internal affairs action; and a finding that New York is a less "convenient" and "efficient" forum

than Illinois falls far short of one that suit in New York is "vexatious or oppressive".

The terms "vexatious or oppressive" connote conduct much harsher than the mere selection of a forum inconvenient to the defendant. They presuppose conditions in which "it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice", *In re Norton's Settlement*, *supra*, (1908) 1 Ch., at 479. Mere "questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings"; *ibid.*, at 482. Since the District Court did not find that the institution of this action in the Eastern District of New York was "vexatious or oppressive" within this meaning of the term, its exercise of discretion in declining jurisdiction is not conclusive on appeal.*

2. The present plaintiff is a resident of New York. He has brought this action in the district in which he lives, in which he became a member of respondent, and in which respondent is licensed to do business and is doing an extensive amount of business. He is represented by a lawyer whom he knows and in whom he has confidence. No suggestion is made by respondent that petitioner has brought suit in New York for any ulterior purpose, or for any reason other than that of getting justice. Nor is it intimated that it would be "very difficult or practically impossible" for respondent to get justice in New York. The forum may be inconvenient to respondent; litigation there may involve expense; but it was not selected in bad faith. It is, therefore, neither vexatious nor oppressive.

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* In the *Williams* case, *supra*, 66 S. Ct. 284 (last paragraph of the opinion) this Court enumerated various facts—such as availability of witnesses and records—as indicating "that it would not be vexatious or oppressive to entertain this suit in New York". That was obviously correct reasoning; for the choice of a forum convenient to both parties cannot be vexatious or oppressive. It does not follow conversely that the selection of a forum, merely because it is inconvenient to the defendant, is "vexatious or oppressive". One may prove that an object is not black by showing that it is white; but proof that an object is not white does not establish that it is black, for it may be gray.

3. While the *Williams* case, *supra*, 66 S. Ct. 284, does not expound the terms "vexatious or oppressive", those decisions dealing with actions burdensome to interstate commerce furnish a close and valuable analogy. Suits against interstate carriers instituted in a state of which neither the plaintiff nor the defendant was a resident, in which the defendant was not transacting business, and in which the wrong complained of had not occurred, have been dismissed on the ground that the selection of the forum imposed an undue burden on interstate commerce; *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312 (1923); *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101 (1924). But otherwise where—as in the present case—the plaintiff was a resident of the state in which he sued and the defendant transacted some measure of business there. Residence of the plaintiff has been held to "relieve it of the opprobrium of an impertinent intruder when it went into the local courts", *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519 (1934, per Cardozo, J.). Residence, "even though not controlling, is a fact of high significance"; *ibid.*, p. 520. And where the defendant "brought its property into that state, not fortuitiously or by a rare accident but in furtherance of a systematic course of business", it "subjected itself to suit * * * at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, but oppressive or unreasonable it is not"; *ibid.*, pp. 520-1. Nor is jurisdiction lost "because the chief witnesses on the trial reside in other states";

> "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative convenience of the parties".
>
> *International Milling Co.* v. *Columbia T. Co.*, *supra*, 292 U. S., at 521.

Accord:

*Canadian Pacific R. Co.* v. *Sullivan*, 126 F. 2d 433, at 437-440 (C. C. A. 1, 1942), cert. den. 316 U. S. 696;

*Hirliman* v. *Southern Pac. Co.*, 268 App. Div. 192 (1st Dept., 1944).

This language certainly sheds strong light upon the meaning of "vexatious or oppressive"; and there is nothing in the *Williams* case to detract from it (see *supra*, pp. 10, 16). The present petitioner, like that in the *International Milling* case, *supra*, is a resident of the forum. Respondent is doing business in the state of the forum to an extent greater than was the defendant in the *International Milling* case. In the face of these strong contacts with New York, the burden of bringing witnesses and records to New York is reduced to a mere inconvenience to which respondent must submit.

In admiralty, likewise, discretion to decline jurisdiction will not be exercised where the suit is brought by a resident; for such power exists only "in suits in admiralty between foreigners", *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, *supra*, 285 U. S., at 421. Such also is the law of England, *supra*, pp. 12-13. And even under Scottish law the doctrine of *forum non conveniens* has been held applicable only where the chosen forum "is not the natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties • • •", *Société du Gaz de Paris* v. *"Les Armateurs Francais"*, *supra*, (1926) Sess. Cas., at 206. A forum in which one of the parties resides thus is clearly a "natural or proper forum".

We submit, therefore, that a suit brought in good faith in the district of the plaintiff's residence is not vexatious or oppressive.

## POINT III

**Even if the venue statute were held not to give petitioner an absolute right to sue in New York, the District Court was bound by New York law to accept jurisdiction.**

Assuming, for argument, that Section 51 of the Judicial Code does not give petitioner an absolute right to sue in the district of his residence, the question remains whether the District Court's power—or lack of power—to decline jurisdiction is not governed by the law of New York, the state in which the District Court is sitting.

Had this action been brought in the state courts of New York, jurisdiction would have been mandatory and petitioner could not have been relegated to suit in Illinois. That such is the law of New York with respect to stockholders' derivative actions is plain under the authorities; *Miller* v. *Quincy*, 179 N. Y. 294 (1904); *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (2nd Dept., 1899); *Goldstein* v. *Lightner*, 266 App. Div. 357 (1st Dept., 1943), aff'd 292 N. Y. 670. The Circuit Court so found (R. 44-45, n. 2); and it held that there is "no valid distinction between a stockholders' and a policyholders' derivative suit seeking relief of this character" (R. 45).

We submit that this New York rule, whether it be deemed substantive or procedural in character, binds the District Court.

If the rule be thought substantive—see *Weiss* v. *Routh*, 149 F. 2d 193, at 195 (C. C. A. 2, 1945)—it binds the District Court under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

If the rule be thought procedural—see *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885—it is no less binding. This follows from Rule 45 of the Civil Rules of the District Court for Eastern New York (similar to the rules of other District Courts) which provides:

> "Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure, or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States, or in default thereof the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied."

No statute of the United States and no provision of the Federal Rules of Civil Procedure confers upon the District Court discretion to decline jurisdiction once the statutory requirements of venue are met. Nor does "the procedure heretofore prevailing in courts of equity of the United States" support such power; on the contrary, the New York practice relating to discretionary jurisdiction has heretofore been considered as binding in the federal courts; *Summerall* v. *United Fruit Co.*, 80 F. 2d 1020 (C. C. A. 2, 1936), aff'g 11 F. Supp. 963 (D. C., S. D. N. Y., 1935); *Panstwowe Zaklady Graviozne* v. *Automobile Ins. Co. of Hartford*, 36 F. 2d 504 (D. C., S. D. N. Y., 1928). But even if these precedents should not be deemed conclusive, the last part of Rule 45, *supra*, directs application of the local law of procedure. Under that law jurisdiction is mandatory.

Dated, June 12, 1946.

Respectfully submitted,

MILTON POLLACK,
Attorney for Petitioner.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 206

EUGENE KOSTER,

*Petitioner,*

against

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## REPLY BRIEF FOR PETITIONER

MILTON POLLACK,
*Attorney for Petitioner.*

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EUGENE KOSTER,

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(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

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## REPLY BRIEF FOR PETITIONER

1. Respondent argues that the District Court had discretion to decline jurisdiction because the suit is in equity where jurisdiction is always discretionary (Br., pp. 8-9). But this argument confuses the merits of the case with the jurisdiction of the court. The chancellor's discretionary refusal to wield the powers of equity goes to the merits, not to the jurisdiction proper; *Di Giovanni* v. *Camden Fire Ins. Ass.*, 296 U. S. 64, at 69 (1931). It raises the issue whether the plaintiff is entitled to equitable relief, not in which court or district he should seek that relief. On a motion such as that at bar, addressed only to the jurisdiction, the merits are not open for decision; *Venner* v. *Great Northern R. Co.*, 209 U. S. 24, at 33-35 (1908).

2. For the same reason respondent's argument that petitioner improperly interferes with an insurance company's business (Br., pp. 11-12) is beside the point. If this suit constitutes such interference, it should be dismissed on the merits, not relegated to another district. Incidentally, the argument of interference was considered and rejected by the Court below (R. 45) on the strength of *Winger* v. *Chicago City Bank & Trust Co.*, 325 Ill. App. 459, 60 N. E. 2d 560 (1945). The latter case was recently affirmed by the Supreme Court of Illinois with an exhaustive opinion, *Winger* v. *Chicago City Bank & Trust Co.*, 67 N. E. 2d 265 (1946), which cuts the ground from under respondent's argument.

3. Equally inapposite to this motion are respondent's observations (Br., pp. 18-19) that petitioner, as a policy holder, is only a contract creditor and that he failed to exhaust an available administrative remedy. These grounds, too, bear on the merits, not on the propriety of the choice of forum. That they lack force even on the merits appears from *Winger* v. *Chicago City Bank & Trust Co., supra,* and *Pelcak* v. *Bartos*, 328 Ill. App. 435, 66 N. E. 2d 465 (1946).

4. The pendency of the *Schwartz* action in Illinois (Resp. Br., pp. 15-17) would seem quite immaterial. The *Schwartz* suit was instituted long after that at bar, in fact long after the District Court's decision herein. The District Court's jurisdiction, if properly invoked initially, could not subsequently be divested by the later suit of another policy holder. And it should be noted that the only real defendant served with process herein, the James S. Kemper & Co., Inc. (R. 1), is not even named as a defendant in the *Schwartz* suit.

5. Respondent assumes (Br., pp. 13-15) that the test of "vexatious or oppressive" gives the District Court the same latitude in declining jurisdiction as the test of "con-

venience, efficiency and justice". But clearly the two tests are not co-extensive (our main br., pp. 16-18); and respondent completely ignores the cases here and in England which give the terms "vexatious and oppressive" their narrow definition. "Convenience, efficiency and justice" control the exercise of jurisdiction only in those stereotyped categories of cases to which the doctrine of *forum non conveniens* traditionally applies (such as suits involving the internal affairs of foreign corporations and admiralty suits among foreigners). Assuming that even outside these categories the District Court has some freedom in refusing jurisdiction, yet its discretion is circumscribed by the narrow test of "vexatious or oppressive": The plaintiff must have chosen the forum in bad faith, for the purpose of preventing his adversary from getting justice. Such ulterior purpose has neither been alleged nor proved in this case.

Dated, October 9, 1946.

Respectfully submitted,

MILTON POLLACK,
*Attorney for Petitioner.*

# Supreme Court of the United States

**OCTOBER TERM, 1946**

**No. 206**

EUGENE KOSTER,
Petitioner,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,
Respondent.

## BRIEF FOR PETITIONER.

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# Supreme Court of the United States

OCTOBER TERM, 1946

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**No. 206**

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EUGENE KOSTER,

Petitioner,

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

Respondent.

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## BRIEF FOR PETITIONER.

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### A

### The Opinions Below.

The opinion of the District Court for Eastern New York (R. 22), by Abruzzo, D. J., is reported 64 F. Supp. 595.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 30), by Swan and Chase, C. JJ., is reported 153 F. 2d 888. Clark, C. J., dissented in a separate opinion (R. 35), 153 F. 2d 891.

### B

### Jurisdiction.

The jurisdiction of the District Court rests upon diversity of citizenship, § 24 of the Judicial Code, 28 U. S. C. § 41.

The jurisdiction of this Court rests upon § 240 of the Judicial Code, 28 U. S. C. § 347. This Court granted certiorari on October 14, 1946.

C

## Summary Statement of the Case.

Petitioner asks this Court to review the Circuit Court's affirmance (R. 38) of the final order of the District Court dismissing the action on the ground that it was brought in a *forum non conveniens* (R. 28). A review is also sought of the Circuit Court's denial of rehearing (R. 39).

### 1. Character of the action.

This is a derivative suit for a money judgment brought by petitioner as plaintiff on behalf and for the benefit of defendant-respondent (American) Lumbermens Mutual Casualty Company ("Lumbermens" hereafter) (R. 3).

Lumbermens is a mutual insurance company organized in Illinois, licensed to do and doing business in New York (R. 14). Petitioner, a citizen of New York and a resident of its Eastern District (R. 2), has been since May, 1941, and now is a member and policy holder of Lumbermens (R. 3).

Lumbermens is only a formal or nominal defendant. The real defendants are James S. Kemper, the President, Manager and Chairman of the Board of Lumbermens (R. 3), and James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), an Illinois corporation (R. 3) controlled by Kemper and his family (R. 5).

The complaint (R. 2) charges Kemper with the waste and diversion of Lumbermens' assets. Kemper caused Lumbermens to pay him excessive salary and other compensation for 1942 (first cause of action); to pay unwarranted commissions and fees to Kemper & Co. (second cause of action); and to sell to him, and to persons allied with him, substantial amounts of securities at prices well below their value (third and fourth causes of action).

The complaint prays that Kemper and Kemper & Co. be directed to account to Lumbermens for its damages and for their profits (R. 11).

**2. Lumbermens' motion to dismiss.**

Lumbermens, for whose benefit this action is brought, moved to dismiss it on two grounds: (1) *forum non conveniens;* and (2) absence of an indispensable party defendant (R. 13-14). The second ground of motion was overruled by the Circuit Court (R. 31) and will not again be referred to herein.

Lumbermens' motion did not question federal jurisdiction or the propriety of venue. Diversity of citizenship and a $3,000 amount in controversy are alleged (R. 2-3) and undisputed. The venue, laid in the district of petitioner's residence (R. 2), complies with § 51 of the Judicial Code, 28 U. S. C. § 112.

But Lumbermens contended that the District Court, in the exercise of its discretion, should decline jurisdiction because this suit involves its "internal affairs" which can more conveniently be adjudicated in Illinois, the state of its incorporation, than in New York (R. 14-20). In support of the plea of inconvenience Lumbermens stated that its head office is in Chicago; five of its seven directors, most of its officers and more than one-third of its employees reside in Illinois; its general business records are kept there; most of the witnesses and records necessary for the trial would have to be brought from Chicago to New York with consequent expense, loss of time and inconvenience (R. 17-19). By contrast, it was contended that petitioner's proportionate individual interest in the recovery would be negligible and that trial of the action in Illinois would put him to no substantial inconvenience (R. 17).

Lumbermens further argued that the action involves difficult problems of Illinois law which could more efficiently be determined by the courts of that state, including the question whether petitioner is barred from access to the courts by a provision of the Illinois Insurance Code allegedly requiring him to address his complaint to the Director of Insurance of Illinois (R. 26-27).

**3. The decisions below.**

(a) *The District Court's decision* (R. 22): The District Court held that the action involves the internal affairs of Lumbermens and that the difficulty of bringing witnesses and records from Chicago to New York, the scarcity of hotel accommodations in New York, and the necessity of deciding difficult questions of Illinois law make Illinois the most appropriate forum.

(b) *The Circuit Court's majority decision* (R. 30): The Circuit Court, in affirming this decision, held:

1. This action does not involve the internal affairs of Lumbermens since it seeks only a money judgment (referring to *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 [1946]) (R. 32).

2. Had this action been brought in the New York State courts, jurisdiction would have been mandatory (R. 32, note 2).

3. Under the law of Illinois, petitioner is entitled to maintain this action and is not relegated to his remedy before the Illinois Director of Insurance* (R. 33-34).

4. Nevertheless, the action must be dismissed because the District Court, without abuse of discretion, found the suit "so vexatious or oppressive that 'considerations of convenience, efficiency and justice point to the courts of the state of the domicile as appropriate tribunals'" (referring to *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 131, and to the *Williams* case, *supra*) (R. 34-35).

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* This conclusion is now fortified by *Winger* v. *Chicago City Bank & Trust Co.*, 394 Ill. 94 (1946). Upon a complaint substantially the same as that at bar, the United States District Court for the Northern District of Illinois, Eastern Division, reached the same result in *Schwartz* v. *Kemper*, Index No. 46-C-96. The opinion in the latter case, dated October 28, 1946, rests on a comprehensive discussion of the pertinent Illinois authorities.

(c) *Judge Clark's dissent* (R. 35): Judge Clark thought that *Williams v. Green Bay & Western R. Co., supra*, 326 U.S. 549, restricted rather than extended the scope of the *forum non conveniens* rule. That rule, theretofore limited to cases involving the internal affairs of foreign corporations and to certain admiralty controversies, cannot be extended to actions seeking merely a money judgment. The mere inconvenience of the chosen forum to the defendant and to witnesses is not enough to render the suit vexatious or oppressive.

## D

## Assignment of Errors.

1. The Circuit Court erred in overruling petitioner's contention that the venue statute (§ 51 of the Judicial Code, 28 U. S. C. § 112) gives petitioner an absolute right to bring this suit in the Eastern District of New York where he resides.

2. The Circuit Court erred in holding that the institution of this suit in the district in which plaintiff resides and defendant is licensed to do and doing business was vexatious or oppressive.

3. The Circuit Court erred in refusing to follow the law of New York under which the court must retain jurisdiction of an action such as that at bar.

## Summary of Argument.

We propose to show:

1. This action does not involve the internal affairs of a foreign corporation (Point I);

2. The venue statute gives petitioner an absolute right to bring this action in the district of his residence (Point II);

3. In any event, the choice of the New York forum was neither vexatious nor oppressive (Point III); and

4. The District Court should have followed the laws of the State of New York under which jurisdiction of an action such as that at bar is mandatory (Point IV).

## POINT I

**This action does not involve the internal affairs of a foreign corporation.**

Lumbermens' motion to dismiss the complaint invokes the doctrine of *forum non conveniens* on the theory that this action would require the court "to interfere with and control the internal affairs of a foreign insurance corporation" (R. 13-14). The District Court adopted this contention (R. 27, 28).*

But the Circuit Court rejected it and concluded that "the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation" (R. 32).

Since respondent, however, still maintains its original position, we shall briefly show that this action is, indeed, not an "internal affairs" suit.

1. In the light of this Court's recent decision in *Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 (1946), this conclusion is inevitable. The action seeks only a money judgment; and it seeks that judgment only against the defendants other than Lumbermens. It demands an accounting by Lumbermens' fiduciaries† for their alleged

* The District Court's decision was rendered before this Court's decision in *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549 (1946).

† That Kemper, as the president and general manager of Lumbermens, occupied a fiduciary position requires no discussion. Kemper & Co., his personal holding company, by knowingly participating in Kemper's unfaithfulness, became equally liable; *Jackson* v. *Smith*, 254 U. S. 586, at 589 (1921); *Restatement, Agency*, §§ 312, 314.

breaches of duty; but it does not invoke the exercise of the state's visitorial or supervisory powers over the foreign corporation. Enforcement of the court's decree against those defendants over whom it has personal jurisdiction will be routine. The suit is thus clearly not one involving the internal affairs of a foreign corporation, as defined in the *Williams* case.

2. Nor would the law of New York, assuming it to be applicable, permit a different conclusion. It is well settled in New York that a derivative suit on behalf of a foreign corporation, seeking an accounting for the waste or diversion of corporate assets, does not involve the "internal affairs" of the foreign corporation. In such an action the jurisdiction of the New York courts is mandatory. The Circuit Court so held (R. 32-33, note 2); and the cases are unanimous.

*Miller* v. *Quincy*, 179 N. Y. 294 (1904);
*Goldstein* v. *Lightner*, 266 App. Div. 357 (1943), aff'd 292 N. Y. 670;
*Ramsey* v. *Rosenthal*, 242 App. Div. 526 (1934);
*Hamm* v. *Christian Herald Ass'n*, 236 App. Div. 639 (1932);
*Jacobs* v. *Mexican Sugar Refining Co.*, 104 App. Div. 242 (1905);
*Hallenberg* v. *Greene*, 66 App. Div. 590 (1901);
*Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (1899);
*Tarlow* v. *Archbell*, 47 N. Y. S. 2nd 3, at 7-8 (1943), aff'd 269 App. Div. 837 (1945);
*Restatement, Conflict of Laws*, sec. 199, and N. Y. Annotations.

The fact that these cases involved derivative suits brought by shareholders or directors of stock corporations, rather than by a member and policyholder of a mutual insurance company, supports no distinction. For "each member bears a relation to the mutual company

analogous to that which a stockholder bears to the joint stock company in which he holds stock"; *Duffy* v. *Mutual Benefit Life Ins. Co.*, 272 U. S. 613, at 619 (1926); *Young* v. *Equitable Life Ass. Soc.*, 49 Misc. 347, at 361-2 (1906), aff'd 112 App. Div. 760 (1906); *Knights Templars Ind. Co.* v. *Vail*, 206 Ill. 404, at 411-2 (1903); *Pelcak* v. *Bartos*, 328 Ill. App. 435, at 443 (1946). The Court below, accordingly, saw "no valid distinction between a stockholder's and a policyholder's derivative suit seeking relief of this character" (R. 33).

3. Under Illinois law the right of a member and policyholder to sue derivatively on behalf of a mutual insurance company is now established: *Winger* v. *Chicago City Bank & Trust Co.*, 394 Ill. 94 (1946); *Pelcak* v. *Bartos*, *supra*. If this suit were brought by Lumbermens itself against its unfaithful fiduciaries, its "internal affairs" would obviously not be involved. The character of the suit is not changed because it is brought derivatively by petitioner on behalf and in the right of Lumbermens. The complainant in a derivative action is only the "instigator" of the suit; the corporation, although a "nominal party defendant", is "in reality a plaintiff". *Monahan* v. *Kenny*, 248 App. Div. 159, at 160 (1936); *Chaplin* v. *Selznick*, 293 N. Y. 529, at 532 (1944); *Bingham* v. *Ditzler*, 309 Ill. App. 581, at 594 (1941), quoting from *Pomeroy's Equity Jurisprudence* (3rd Ed.), sec. 1095. The corporation may sue its unfaithful directors and officers in any appropriate venue in which it finds them, unhampered by the internal affairs rule; and since "the right of the plaintiffs as stockholders to compel a restoration by the officers to the corporation is co-extensive with the right of the corporation itself", *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388, at 391 (1899), a stockholder or policyholder in a derivative suit has the same choice.

We submit, therefore, that the Circuit Court properly held that this action does not involve the internal affairs of a foreign corporation.

## POINT II

**The venue statute gives petitioner an absolute right to bring this action in the district of his residence.**

Although the Circuit Court rejected respondent's basic contention that this action involves the internal affairs of a foreign corporation, it nevertheless dismissed this action as brought in a *forum non conveniens*. In so holding, the Circuit Court enunciated the novel and far-reaching principle that actions of any kind, even though for a simple breach of contract or fiduciary duty, must not only comply with the statutory jurisdictional and venue requirements, but must also meet an additional judicial requirement: That the district of suit be not "vexatious or oppressive".

We submit that Congress, by enacting the venue statute, § 51 of the Judicial Code, 28 U. S. C. § 112,* gave petitioner the absolute right to sue in the district of his residence.

1. The rule that federal jurisdiction, once its statutory requirements are met, is mandatory goes back to *Cohens v. Virginia*, 6 Wheat. (19 U. S.) 264, at 404 (1821). That federal venue is equally mandatory has been well established since *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941).

In the *Kepner* case this Court construed § 6 of the Federal Employers' Liability Act under which an action may be brought in any one of several specified districts. This Court held that the plaintiff had an absolute choice of venue regardless of inconvenience and expense to the defendant resulting from the necessity of bringing remote witnesses into the jurisdiction:

* § 51 of the Judicial Code, so far as pertinent, provides: "* * * where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative * * *. Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York." (314 U. S., at 54)

Both the plaintiff and the defendant in the *Kepner* case were residents of Ohio; the accident had occurred there; and approximately twenty-five witnesses resided near the place of the accident who could be transported only at considerable cost to New York where Kepner had brought his suit. Nevertheless, this Court rejected the Railroad's contention that the prosecution of the suit in New York would be "an unreasonable, improper and inequitable burden" upon it (314 U. S., at 48).

There is no distinction in principle between the special venue under § 6 of the Federal Employers' Liability Act and the general venue under § 51 of the Judicial Code: *Gilbert* v. *Gulf Oil Co.*, 153 F. 2d 883, at 885 (C. C. A. 2, 1946). "The phrasing of the section [§ 6] is not unique; it follows the familiar pattern generally employed by Congress in framing venue provisions" (Frankfurter, J., dissenting in the *Kepner* case, 314 U. S., at 56, 62). The absolute choice allowed by one section clearly bespeaks, therefore, the similar right granted by the other.

2. Federal courts do on occasion decline jurisdiction in favor of a more convenient forum; but this power has been limited to "particular classes of cases", *Massachusetts* v. *Missouri*, 308 U. S. 1, at 19 (1939), where "exceptional circumstances of a *stereotyped nature*" intervene; *Griffith* v. *Bank of New York*, 147 F. (2d) 899, at 904 (C. C. A. 2, 1945). However, analysis reveals that these "particular" cases do not constitute exceptions from the mandatory venue statute.

(a) Federal courts can reject suits involving the internal affairs of a foreign corporation. This rejection, how-

ever, is due to "the basic reason (of) the impossibility of making an effective decree", *Blair, The Doctrine of Forum Non Conveniens*, 29 Col. L. Rev. 1, at 22, ftn. 105; *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S., at 555-6. Accordingly, this Court held, in the *Williams* case, that an action seeking a mere money judgment does not involve internal corporate affairs, since the effectiveness of the decree in such a case is unquestionable. The internal affairs rule thus is more nearly one of "substantive law—that of corporate supervision"; *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885. Hence, it does not exemplify judicial power to nullify the plaintiff's absolute choice of suing in any proper venue.

(b) Cases involving a conflict of jurisdiction between courts and administrative agencies generally or between federal and state governments are summarized at length in *Meredith* v. *Winter Haven*, 320 U. S. 228, at 235-236 (1943). These cases patently are not exceptions to the mandatory venue provisions; since they do not involve the geographical locale of litigation.

(c) Admiralty cases: Such cases are most frequently cited to establish the power to apply the doctrine of *forum non conveniens*. *The Belgenland*, 114 U. S. 355 (1885); *Charter Shipping Co.* v. *Bowring, Jones & Tidy*, 281 U. S. 515 (1930); *Langnes* v. *Green*, 282 U. S. 531 (1931); *Canada Malting Co.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932). However, admiralty cases are not covered by any venue statute; *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. (85 U. S.) 272 (1874). Since Congress did not specify the district in which admiralty suits shall be brought, the doctrine of *forum non conveniens* is afforded free play.

(d) The same observations may well be applicable to cases removed from the state to the federal courts; they, too, are not within the scope of the venue statute. *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 271-9 (1922).

3. We submit that *forum non conveniens* has a proper, perhaps an essential function in any judicial system or field of litigation in which the legislature fails to fix the place in which action can and shall be brought. Under such a system or in such a field, the plaintiff can choose a forum without regard to any of his legitimate interests and for the sole purpose of vexing and harassing the defendant. To prevent such abuses courts have adopted the doctrine of *forum non conveniens*. Its operation is indicated by the leading case of *Société du Gaz de Paris* v. *"Les Armateurs Français"*, (1926) Sess. Cas. 13 (H. L.), at 20, which held the doctrine to be applicable where the chosen forum "is not a natural or proper forum, either on the ground of convenience of trial or the residence or domicile of parties, or of its being either the locus contractus or the locus solutionis" (quoted with approval in *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S. 549, at note 4).

In the absence of a controlling statute, a forum will thus be held "natural or proper" if it has sufficient contacts with the residence of the parties or the subject matter of the controversy. But the judicial quest for the "natural or proper" forum becomes meaningless under a system such as that created by the federal venue statute, which restricts litigation to the residence of the plaintiff or the defendant. Under our federal system, at least so far as original diversity jurisdiction is concerned, Congress has assumed the task, left by other jurisdictions to the courts, of circumscribing the forum or venue in which action must be instituted. In so doing, Congress limited the choice to confines much narrower than those allowed by the judge-made rule of *forum non conveniens*. Of the several contacts which, under other systems, render a forum "natural or proper", Congress rejected all except the residence of the parties; but residence of the parties has been given definite statutory sanction as a proper and sufficient basis for the choice of forum.

The fluid rule of other jurisdictions was thus replaced in our federal system by one more rigid, to be sure, but also

more certain in its application. The purposes of the two systems are the same; but they are achieved by different methods. The judge-made rule of *forum non conveniens* and the statutory rules of venue, since they are *in pari materia*, are, by their nature, mutually exclusive. To engraft the rule of judicial discretion on ours, which is aimed at certainty, would defeat the purposes of Congress and defy the absolute terms of the venue statute.

4. It is true that *Williams* v. *Green Bay & W. R. Co.*, *supra*, 326 U. S., at 554, 559, mentions the "vexatious or oppressive" choice of forum as a ground for dismissal. However, the question whether application of the doctrine of *forum non conveniens* is inconsistent with the absolute terms of the venue statute was not involved in the *Williams* case. For the *Williams* action was not an original federal court suit; it had been removed from the state to the federal court (326 U. S., at 550-1). The venue statute was, therefore, by its very terms inapplicable, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, *supra*, 260 U. S., at 274-9. The problem in the case at bar, whether the applicability of the venue statute precludes application of the *forum non conveniens* doctrine, could therefore not arise in the *Williams* case.

Moreover, we do not believe that the *Williams* case was intended to establish *forum non conveniens* as a broad and all-pervasive doctrine. The *Williams* action had been dismissed by the Circuit Court as involving the internal affairs of a foreign corporation (147 F. 2d 777). But even an internal affairs suit may be dismissed only if "considerations of convenience, efficiency and justice" point to the domicile of the corporation as the more appropriate forum (see *Rogers* v. *Guaranty Trust Co.*, *supra*, 288 U. S. 123, at 131). This Court, therefore, in reversing the Circuit Court's decision in the *Williams* case, relied on two separate grounds: The *Williams* suit was not an internal affairs action; and, in any event, the plaintiff's choice

of the New York forum was neither vexatious nor oppressive (326 U. S., at 559-560).

The latter ground was clearly appropriate to the decision of a case which was claimed to involve the internal affairs of a foreign corporation. But there is nothing in the *Williams* opinion to suggest that a finding of "vexatious or oppressive" would justify the dismissal of a suit not falling into any of the "particular classes of cases" to which the doctrine of *forum non conveniens* has heretofore been confined (*supra*, p. 10). This Court, we believe, would have used different language had it intended to extend the doctrine, beyond its traditional limits, to simple actions such as one for breach of contract or for an accounting by an unfaithful fiduciary.

5. From a pragmatic point of view the application of *forum non conveniens* to original federal court litigation would hardly commend itself. Federal diversity jurisdiction and venue present a maze of intricate technical problems. The multitude of decisions dealing with the subject attests to the difficulties which in nearly every federal case precede the reaching of the merits. To add a rule making jurisdiction dependent upon the striking of a balance of convenience and efficiency would swell the preliminaries of federal litigation to altogether inordinate proportions. Since the decision would depend upon the district court's discretion, the complexities of federal jurisdiction and venue would be aggravated by the uncertainty and delay inherent in every exercise of discretionary judicial power.

We submit, that the venue statute gives petitioner an absolute right to maintain this suit in the Eastern District of New York, the district of his residence, and that the District Court was without discretionary power to relegate him to another forum.

## POINT III.

**Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive.**

For argument under this point we assume that an action, even though brought in the proper venue, may be dismissed in the court's discretion as "vexatious or oppressive". We propose to show that the facts disclosed by the record fail, as a matter of law, to furnish any basis for a finding that the selection of the New York forum was vexatious or oppressive.

1. The Circuit Court, in pronouncing the rule of "vexatious or oppressive", relied solely on *Williams* v. *Green Bay & W. R. Co., supra,* 326 U. S. 549. The *Williams* case does not define those terms;* nor is a definition to be found in legal writings such as those of *Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law* (29 Col. L. Rev. 1), *Foster, Place of Trial in Civil Actions* (43 Harv. L. Rev. 1217, 44 Harv. L. Rev. 41), and *Dainow, The Inappropriate Forum* (29 Ill. L. Rev. 867). This Court in the *Williams* case, *supra,* cited two other authorities: A Scottish decision, *Société du Gaz de Paris* v. *"Les Armateurs Français"*, (1926) Sess. Cas. 13 (H. L.); and a British author, *Gibb, International Law of Jurisdiction* (1926), pp. 212, 213.

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* In the *Williams* case, *supra,* 326 U. S., at 559-560, this Court enumerated various facts—such as availability of witnesses and records—as indicating "that it would not be vexatious or oppressive to entertain this suit in New York". That was obviously correct reasoning; for the choice of a forum convenient to both parties cannot be vexatious or oppressive. It does not follow conversely that the selection of a forum, merely because it is inconvenient to the defendant, is "vexatious or oppressive". One may prove that an object is not black by showing that it is white; but proof that an object is not white does not establish that it is black, for it may be gray.

2. Scottish cases are not too helpful as authorities in this country. Scotland has adopted the civil law rule of *actor sequitur forum rei*—the plaintiff must sue in the forum of the defendant; *Williamson* v. *North Eastern Ry. Co.*, 11 Rettie (Sess. Cas., 4th Ser.) 596, at 598 (1884). That principle necessarily colors those Scottish decisions which apply the rule of *forum non conveniens;* see *Société du Gaz de Paris* v. *"Les Armateurs Français"*, *supra*, (1926) Sess. Cas., at 21. The rule *actor sequitur forum rei* fits ill into our common law system of jurisprudence which recognizes "the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him": *Netograph Mfg. Co.* v. *Scrugham*, 197 N. Y. 377, at 380 (1910). Both Scottish and English courts have emphasized, therefore, that Scottish law carries the doctrine of *forum non conveniens* much further than England: *Ewing* v. *Orr Ewing*, (1885) 10 App. Cas. 453, at 506 (H. L.); *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141, at 149. Even so, Scottish law recognizes that a forum bearing a "natural or proper relation" to the residence of the parties or to the subject matter of the controversy will not be condemned as *forum non conveniens* (see *supra*, p. 12).

3. More pertinent are the English authorities cited by *Gibb*. Their rule is that jurisdiction may be declined only if both parties are non-residents of England and if the English forum has been selected in bad faith, with the sole intent of harassing the defendant; *Logan* v. *Bank of Scotland*, (1906) 1 K. B. 141; *Egbert* v. *Short*, (1907) 2 Ch. 205; *In re Norton's Settlement*, (1908) 1 Ch. 471. The last cited case, summing up the earlier law, holds:

> "* * * in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done—in this sense,

that *it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country.*" (p. 479)

"* * * Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would practically be compelled to settle the action on the terms of the solicitors' letter which I have already referred to.

"I have gone into the matter at this length in order to make it quite clear that *questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings.*" (p. 482) (Italics added)

Similarly in *Egbert* v. *Short*, *supra*, (1907) 2 Ch., at 214:

"She (plaintiff) is not resident in England in the proper sense of the term. * * * this action is brought in the tribunal in which it has been brought not bona fide for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled."

4. In this country, those decisions dealing with actions burdensome to interstate commerce furnish valuable guidance in determining when the selection of a forum is "vexatious or oppressive". Suits against interstate carriers instituted in a state of which neither the plaintiff nor the defendant was a resident, in which the defendant was not transacting business, and in which the wrong complained of had not occurred, have been dismissed on the ground that the selection of the forum imposed an undue burden on interstate commerce: *Davis* v. *Farmers' Co-Op. Equity Co.*, 262 U. S. 312 (1923); *Atchison, T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101 (1924). But otherwise where—as in the present case—the plaintiff was a resident of the state in which he sued and the defendant transacted some measure of business there. Residence of the plaintiff has been held to "relieve it of the opprobrium of an imperti-

nent intruder when it went into the local courts", *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, at 519 (1934, per Cardozo, J.). Residence, "even though not controlling, is a fact of high significance"; *ibid.*, p. 520. And where the defendant

> "brought its property into that state, not fortuitously or by a rare accident but in furtherance of a systematic course of business, [it] subjected itself to suit . . . at the instance of a local creditor, who could not with equal convenience or facility have sued it anywhere else. Such a suit may be a burden, *but oppressive or unreasonable it is not.*" (292 U. S., at 520-1; italics added)

Nor is jurisdiction lost "because the chief witnesses on the trial reside in other states":

> "As a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative convenience of the parties."
>
> *International Milling Co.* v. *Columbia T. Co.*, *supra*, 292 U. S., at 521.

Accord:

*Canadian Pacific R. Co.* v. *Sullivan*, 126 F. 2d 433, at 437-440 (C. C. A. 1, 1942), cert. den. 316 U. S. 696;

*Hirliman* v. *Southern Pac. Co.*, 268 App. Div. 192 (1944).

5. The present petitioner, like that in the *International Milling* case, *supra*, is a resident of the forum. He has brought the action in the district in which he lives and in which he made his contract with and became a member of respondent. He is represented by a lawyer whom he knows and in whom he has confidence.

Respondent, in turn, is licensed to do business in New York. It is doing business in that state to an extent cer-

tainly greater than was the defendant in the *International Milling* case, *supra*.

In the face of these strong contacts with New York, the burden of bringing witnesses and records to New York—if they must be brought at all (R. 37)—is reduced to a mere inconvenience, to which respondent must submit. No suggestion is made by respondent that petitioner has brought suit in New York for any ulterior purpose, or for any reason other than that of getting justice. Nor is it intimated that it would be "very difficult or practically impossible for respondent to get justice" in New York. The forum may be inconvenient to respondent; litigation there may involve expense; but it was not selected in bad faith. It is, therefore, neither vexatious nor oppressive.

6. Despite these considerations, the Circuit Court thought that it was unable, on appeal, to review the District Court's exercise of discretion in declining jurisdiction (R. 35). However, the District Court's discretion was affected by such errors of law as necessarily destroyed its conclusiveness upon an appellate court.

In rejecting jurisdiction, the District Court relied on a congeries of reasons. At least two of them were clearly erroneous. The District Court held that "the suit relates to the internal affairs of a foreign corporation" (R. 27, 28); the Circuit Court recognized that it does not (R. 32). The District Court held that petitioner's remedy was with the Director of Insurance of Illinois (R. 26); the Circuit Court ruled otherwise (R. 33). Since these erroneous views of the law may have seriously influenced the District Court's exercise of discretion, the appellate court is not concluded by it.

But the District Court's decision is even more fatally defective. The District Court merely held that "the convenience of witnesses and efficiency and justice" point to Illinois as the proper forum (R. 27). This might have been enough on the District Court's premise that the suit in-

volves the internal affairs of an Illinois corporation. *Rogers* v. *Guaranty Trust Co., supra*, 288 U. S., at 131. But this suit is not an "internal affairs" action; and a finding that New York is a less "convenient" and "efficient" forum than Illinois falls far short of one that suit in New York is "vexatious or oppressive".

The terms "vexatious or oppressive" connote conduct much harsher than the mere selection of a forum inconvenient to the defendant. They presuppose conditions in which "it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice". *In re Norton's Settlement, supra* (1908), 1 Ch., at 479. Mere "questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings"; *ibid.*, at 482. Since the District Court did not find that the institution of this action in the Eastern District of New York was "vexatious or oppressive" within this meaning of the term, its exercise of discretion in declining jurisdiction is not conclusive on appeal.

We submit that the Court below erred in holding that the institution of this action in the Eastern District of New York was vexatious or oppressive.

## POINT IV

**Even if it were held that the venue statute does not give petitioner an absolute right to sue in New York, the District Court was bound by New York law to take jurisdiction.**

Assuming, for argument, that § 51 of the Judicial Code does not give petitioner an absolute right to sue in the district of his residence, the question remains whether the District Court's power—or lack of power—to decline jurisdiction is not governed by the law of New York, the state in which the District Court is sitting.

Had this action been brought in the state courts of New York, jurisdiction would have been mandatory and petitioner could not have been relegated to suit in Illinois. *Wedemann* v. *U. S. Trust Co. of New York*, 258 N. Y. 315, at 318 (1932); *Reeve* v. *Cromwell*, 227 App. Div. 32, at 36 (1929); and cases cited *supra*, p. 7. We submit that this New York rule, whether it be deemed substantive or procedural in character, binds the District Court.

If the rule be thought substantive—see *Weiss* v. *Routh*, 149 F. 2d 193, at 195 (C. C. A. 2, 1945)—it binds the District Court under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

If the rule be thought procedural—see *Gilbert* v. *Gulf Oil Co.*, *supra*, 153 F. 2d, at 885—it is no less binding. This follows from Rule 45 of the Civil Rules of the District Court for Eastern New York which provides:

> "Whenever a procedural question arises which is not covered by the provisions of any statute of the United States, or of the Federal Rules of Civil Procedure, or of these rules, it shall be determined, if possible, by the parallels or analogies furnished by such statutes and rules. If, however, no such parallels or analogies exist, then the procedure heretofore prevailing in courts of equity of the United States, or in default thereof the procedure which shall then prevail in the Supreme Court of the State of New York shall be applied."

No statute of the United States and no provision of the Federal Rules of Civil Procedure confers upon the District Court discretion to decline jurisdiction once the statutory requirements of venue are met. Nor does "the procedure heretofore prevailing in courts of equity of the United States" support such power; on the contrary, the New York practice relating to discretionary jurisdiction has heretofore been considered as binding in the federal courts; *Sumerall* v. *United Fruit Co.*, 80 F. 2d 1020 (C. C. A. 2, 1936), rg 11 F. Supp. 963 (D. C., S. D. N. Y., 1935); *Panstwowe*

*Zakłady Graviozně* v. *Automobile Ins. Co. of Hartford*, 36 F. 2d 504 (D. C., S. D. N. Y., 1928). But even if these precedents should not be deemed conclusive, the last part of Rule 45, *supra*, directs application of the local law of procedure. Under that law jurisdiction is mandatory.

Respectfully submitted,

JULIUS LEVY,
Counsel for Petitioner.

WILLIAM E. HAUDEK,
on the Brief.

Dated, November 21, 1946.

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# Supreme Court of the United States

**OCTOBER TERM, 1946**

**No. 206**

EUGENE KOSTER,

*Petitioner,*

vs.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## REPLY BRIEF FOR PETITIONER

JULIUS LEVY,
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WILLIAM E. HAUDEK,
on the Brief.

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# Supreme Court of the United States

**OCTOBER TERM, 1946**

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**No. 206**

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EUGENE KOSTER,

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(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

---

## REPLY BRIEF FOR PETITIONER

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### POINT I

**The venue statute gives petitioner the absolute right to bring this action in the district of his residence.**

1. Respondent's authorities (Br., p. 7) do not militate against this proposition, since none of those cases involved the impact of the federal venue legislation upon the doctrine of *forum non conveniens*.

*Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549 (1946), was not an original federal court suit; it had been removed from the State to the Federal Court (326 U. S., at 550-1). *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123 (1933), likewise had been removed from the State to the Federal Court (288 U. S., at 124). Hence, in both cases, the venue statute was by its very terms inapplicable, *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, at 274-9 (1922).

*Canada Malting Co.* v. *Paterson Steamship, Ltd.*, 285 U. S. 413 (1932), was an admiralty suit. Admiralty cases are not governed by any venue statute, *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. (85 U. S.) 272 (1874).

*Massachusetts* v. *Missouri*, 308 U. S. 1 (1939), involved the original jurisdiction of this Court. The case in no way involved the venue statute which relates only to actions instituted in district courts. This Court was, however, careful to point out that *forum non conveniens* is only "applicable to particular classes of cases" (308 U. S., at 19) (Our Main Brief, pp. 10-13).

Even more remote is *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935), which resolves a conflict of jurisdiction between a Federal court receivership and a duly authorized and empowered state administrative agency. No question of venue was involved.

Respondent's last case, *Meredith* v. *Winter Haven*, 320 U. S. 228 (1943), hardly helps it; for there it was held that the necessity of resolving difficult questions of state law does not justify a federal court in declining jurisdiction.

Thus, in none of the above cases, was this Court confronted with the problem at bar—whether the *forum non conveniens* doctrine could be superimposed upon the statutory venue requirement.

2. Respondent would distinguish *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44 (1941), on the ground that it involved a federal statute which, in creating a right of action, created also a special venue privilege. But the character of the right asserted has no bearing on the nature and scope of the venue privilege. This was recognized in the dissenting opinion of Mr. Justice Frankfurter, 314 U. S., at 62:

> "If the privilege afforded a plaintiff to bring suit under the Employers' Liability Act in one place rather than in another is to be regarded as an absolute command to the federal courts to take jurisdiction regardless of any considerations of justice and fairness, why

is not the same effect to be given the comparable general venue provisions of § 51 of the Judicial Code, 28 USCA § 112? Nothing in the language or the history of the venue provision of the Act differentiates it from the numerous other venue provisions of the Judicial Code."

## POINT II

**Institution of this suit in the Eastern District of New York was neither vexatious nor oppressive.**

1. Respondent enumerates a long list of factors indicating that the trial of this action in Illinois, rather than in New York, would greatly serve respondent's convenience. However, even if it were assumed that the district court had power to decline jurisdiction of an action brought in the proper venue, still the convenience of a litigant is not one of the elements by which the Court's discretion may be guided.

Only a "vexatious or oppressive" choice of forum may justify a district court in rejecting jurisdiction, *Williams* v. *Green Bay & W. R. Co.*, 326 U. S., at 554, 559. A finding of "vexatious or oppressive" presupposes bad faith. Mere expense or inconvenience to the respondent is not sufficient (Our Main Brief, pp. 16-20). Respondent's brief altogether fails to show that it would be "very difficult or practically impossible" for it "to get justice" in New York (see *In re Norton's Settlement* [1908], 1 Ch. 471, at 479).

2. Going beyond the record, respondent (Br., pp. 13, 14) refers to an action (*Schwartz* v. *Kemper et al.*) now pending in the North District of Illinois, for substantially the same relief, as an additional ground to defeat jurisdiction of this action.

We submit that this appeal should be decided solely on the record created before the district court. In any event,

however, the pendency of the *Schwartz* action in Illinois would seem quite immaterial. The *Schwartz* suit was instituted long after that at bar, in fact long after the District Court's decision herein. The District Court's jurisdiction, if properly invoked initially, could not subsequently be divested by a later suit of another policy holder. And it should be noted that the only real defendant served with process herein, the James S. Kemper & Co., Inc. (R. 1), is not even named as a defendant in the *Schwartz* suit.

## POINT III

**Under the law of New York the jurisdiction of the court would be mandatory.**

The cases cited in our main brief (7) clearly sustain that proposition. Respondent (Br., pp. 14-15) would distinguish those authorities on the ground that in each case cited by us, jurisdiction was retained either because the corporation's principal place of business or its financial domicile was in New York, or because all or a substantial part of its property was located there, or because most of the officers and directors were within the jurisdiction.

This contention is refuted by *Goldstein* v. *Lightner*, 266 App. Div. 357, aff'd 292 N. Y. 670 (1944). That case was an action by a stockholder of a New Jersey corporation. The complaint, as appears from the record on appeal, stated two causes of action. The first, derivative in character, sought to recover from the corporate directors the damages which the corporation had sustained by reason of unauthorized investments of its funds and excessive salary payments. The second cause of action, representative in character, sought to compel the declaration of a dividend out of the corporation's accumulated surplus. The Court held that the second cause of action involved the internal affairs of a foreign corporation and was there-

fore subject to dismissal. But otherwise as to the first cause of action:

> "• • • there was no justification for the dismissal of the first cause of action, which is a derivative suit in behalf of the corporation, to recover from defendant directors of a foreign corporation damages for the breach of their fiduciary duty resulting in waste of the corporate assets. To this cause of action the doctrine of forum non conveniens does not apply. Cuppy v. Ward, 187 App. Div. 625, 632, 176 N. Y. S. 233, affirmed 227 N. Y. 603, 125 N. E. 915; Hamm v. Christian Herald Corporation, 236 App. Div. 639, 642, 260 N. Y. S. 743; Weinstein v. Aeolian Company, 243 App. Div. 355, 356, 277 N. Y. S. 230."

Thus, the nature of the claims asserted—not the amount of corporate activity in the jurisdiction—determines whether an action involves a corporation's internal affairs. The law of New York is clear: A derivative action for breaches of fiduciary duty does not involve the internal affairs of a foreign corporation; a New York court cannot refuse jurisdiction on the basis of *forum non conveniens*.

Respectfully submitted,

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Counsel for Petitioner.

WILLIAM E. HAUDEK,
on the Brief.

Dated: New York, N. Y., December 16, 1946.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1946.**

**No. 206.**

EUGENE KOSTER,

*Petitioner,*

—against—

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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FRANK W. GLENN,
*Of Counsel.*

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# Supreme Court of the United States

**OCTOBER TERM, 1946.**

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EUGENE KOSTER,

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—against—

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

---

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

### The Opinions Below.

The opinion of the District Court (R. 30-37) is reported at 64 F. Supp. 595.

The opinions of the Circuit Court of Appeals (R. 42-49) are reported at 153 F. (2d) 888.

### Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 4, 1946 and its order denying a petition for rehearing was filed March 18, 1946 (R. 68). The issuance of a writ of certiorari is sought pursuant to §240 of the Judicial Code, 28 U. S. C. §347 (Petition, p. 1).

## Statement.

Petitioner, a citizen of New York and a resident of its Eastern District, since May, 1941 and now a member and policyholder of (American) Lumbermens Mutual Casualty Company, a mutual insurance corporation organized under Illinois law (hereinafter called "Lumbermens") has brought this derivative action, based on diversity, in its right and on behalf of all its policyholders* against Lumbermens, James S. Kemper, a citizen and resident of Illinois and James S. Kemper & Co., Inc., an Illinois corporation (hereinafter called "Kemper & Co.").†

**First Cause of Action.**

This cause (against defendants Kemper and Lumbermens) asserts that for 1942 Kemper received an unwarranted increase in salary and other compensation from Lumbermens and that to the extent of the increase over 1941, the payments were without consideration and constituted a gift of corporate assets (R. 3-6).

**Second Cause of Action.**

This cause (against all three defendants) claims that Kemper at all relevant times dominated and controlled the management, personnel and business policies of Lumbermens and of Kemper & Co.; that

* Plaintiff is one of over 400,000 such policyholders (R. 3-4). No other policyholder has joined him.

† On December 27, 1944 Kemper & Co. moved to dismiss on the grounds that (a) it was not qualified to do, and was not doing, business in New York State; and (b) it was not properly served. By order filed February 28, 1945, said motion was denied without prejudice as moot, in view of the prior determination which is the subject of this petition.

Kemper & Co. has received commissions, fees and other payments for agency and other services in the transaction of insurance business for Lumbermens which Lumbermens could have rendered as efficiently for itself with its own organization, personnel and facilities; that Lumbermens "could have secured the same amount of business" without employing and paying Kemper & Co.; that Kemper & Co. employed Lumbermens' facilities and assets in the conduct of its business; that the precise amounts of damage to Lumbermens and of profits to others are unknown to plaintiff; and that plaintiff is without adequate remedy at law (R. 6-8).

**Third and Fourth Causes of Action.**

The third and fourth causes (against defendants Kemper and Lumbermens) are parallel. They respectively allege that Kemper wilfully caused Lumbermens at various times to sell approximately 15,000 shares of stock and $112,050 principal amount of debentures out of Lumbermens' portfolio to himself and to others for sums substantially less than the true value of such securities; that the vendees were officers or directors of Lumbermens or their relatives, friends or business associates (R. 9-14).

**The Prayer.**

The plaintiff prays:

(1) That defendants in each cause of action, except Lumbermens, be required to account to Lumbermens for the alleged damages and profits, with interest;

(2) That plaintiff be awarded the costs and expenses of the action, including, of course, "reasonable counsel and accountants' fees" (R. 14).

Lumbermens moved to dismiss the complaint on the grounds of forum non conveniens and absence of an indispensable party defendant. The former is the only ground before this Court.

## The Facts.

The facts set forth in the moving papers were not challenged by denials from plaintiff, nor were affirmative facts brought forward by plaintiff to contradict or qualify the position of defendant Lumbermens presented by the moving affidavits (R. 19-28, 47). In short, it appeared:

(1) Lumbermens is a mutual insurance company, organized in 1912 in Illinois, where it has since continuously maintained its principal office (R. 20);

(2) Lumbermens is licensed by, and does business as an insurance corporation in, each one of the forty-seven non-domiciliary states, as well as in Canada (R. 21);

(3) Lumbermens has seven directors; five are citizens and residents of Illinois, having regular business addresses in Chicago; none are citizens or residents of New York (R. 21);

(4) All of the officers of Lumbermens are citizens and residents of Illinois, excepting the officers in the local state offices of the company across the country who would have no personal knowledge and no information concerning the issues raised (R. 21);

(5) At the principal offices in Chicago are kept all of the general records and all of the control records relating to Lumbermens' business as an

entity; by requirement of law* such records are kept available either there or in nearby warehouses (R. 21);

(6) All of the acts and transactions complained of took place in Illinois (R. 25).

Additional considerations before the District Court included:

(7) the transportation of large quantities of Lumbermens records from Chicago to the Eastern District, assuming that the provisions of Illinois law prohibiting removal were waived (R. 24);

(8) traveling expenses and subsistence of witnesses for examination before trial and, later, for the trial itself, including directors, officers and employees of Lumbermens, in addition to the officials and employees of the Illinois Department of Insurance, who have regularly audited Lumbermens books and regulated its domiciliary affairs (R. 24);

(9) the loss of time to Lumbermens of those persons in its employ caused by a trial in the Eastern District, as contrasted with a trial in Illinois, with the attendant consequence of direct monetary loss and immeasurable indirect damage to its day-to-day business and the necessity of hiring inexperienced substitute employees (R. 24);

(10) the inconvenience to the Court of construing the numerous provisions of the Illinois Insurance Code, as well as the numerous regula-

* Ill. Rev. Stat. (State Bar Ass'n Ed. 1943) c. 73, §745, provides: "(2) All such books, records, documents, and vouchers of the home office of any domestic [insurance] company • • • shall be preserved and kept available in this State • • • ."

tions issued by the Insurance Department from time to time thereunder (R. 26);

(11) the injustice of imposing this expense on Lumbermens, whether plaintiff is successful or unsuccessful (R. 23-24);

(12) the injustice of imposing this expense on Lumbermens, where there is but negligible cost and no inconvenience to plaintiff in remitting him to the Illinois courts. The only proof to come from plaintiff personally is that he is one of Lumbermens' 400,000 policyholders (R. 24-25);

(13) the injustice of requiring Lumbermens to defend in the forum of plaintiff's residence when plaintiff has never (a) attended any meeting of Lumbermens' policyholders, (b) written or spoken any criticism of the conduct of its affairs to its Board of Directors, (c) written or spoken any complaint or protest concerning any grievance, whether or not now complained of, to the Director of Insurance of Illinois or the Superintendent of Insurance of New York, although the insurance laws of both states clearly contemplate the filing of such complaints by policyholders, and where the total personal gain to plaintiff even if he succeeds would be trivial (R. 25);

(14) the extreme emergency existing with respect to transportation and hotel accommodations in New York City (R. 33).

Finding that, whether plaintiff or defendant should succeed on the merits, it would be most unjust to require Lumbermens to litigate the issues in the Eastern District of New York, the District Court granted respondent's motion and dismissed the action on the ground that considerations of convenience, efficiency and justice indicated that its jurisdiction should not

be exercised. The Circuit Court of Appeals has affirmed, on the ground that maintenance of the suit in New York would be so vexatious and oppressive as to offend those considerations.

## The Questions Presented.

The sole questions presented are:

1. Had the District Court discretion to decline jurisdiction under the doctrine of forum non conveniens?
2. If so, was its discretion properly exercised on the undisputed facts?

This Court is not called upon to decide whether a District Court, in a diversity case, may decline jurisdiction where, upon identical facts, jurisdiction of the state courts (as plaintiff has assumed) would be mandatory. (See Point III, *infra.*)

## POINT I.

**The District Court had discretion to decline jurisdiction.**

The power of a court, although jurisdiction technically exists, to decline its exercise in favor of a more appropriate forum, is well settled.

*Williams* v. *Green Bay & W. R. R.*, 90 L. ed. 247 (1946);
*Meredith* v. *City of Winter Haven*, 320 U. S. 228 (1943);
*Massachusetts* v. *Missouri*, 308 U. S. 1 (1939);
*Pennsylvania* v. *Williams*, 294 U. S. 176 (1935);

*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123 (1933);
*Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

**Plaintiff's "Absolute Right" to Sue in the District Court.**

The Court's power thus to decline is not restricted to particular classes of cases; it is to be found woven among the traditional discretionary powers of courts of equity. As this Court stated in *Meredith* v. *City of Winter Haven, supra,* 320 U. S. at 235:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Judicial discretion requires a concept of the rule with limits not rigidly fixed. In the *Williams* case, *supra,* this Court, in placing the rule of forum non conveniens in "proper perspective", stated:

> "Each case turns on its facts" (90 L. ed. at 252).

Thus the "absolute right to sue in the district of his residence" repeatedly claimed by petitioner (Petition, pp. 9-14) is one without support in the applicable case law.

*Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44 (1941), is not authority to the contrary. It involved a statute—The Federal Employers' Liability Act—which, in creating a right of action at law, set up its own venue provisions. As Mr. Justice Frankfurter pointed out in his dissent, 314 U. S. at 55:

> "Nor does it [the majority opinion] question the familiar doctrine of forum non conveniens under

which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. ed. 837, 842, 843, 52 S. Ct. 413; Massachusetts v. Missouri, 308 U. S. 1, 19, 84 L. ed. 3, 10, 60 S. Ct. 39; Rogers v. Guaranty Trust Co., 288 U. S. 123, 130, 131, 77 L. ed. 652, 656, 657, 53 S. Ct. 295, 89 ALR 720. These manifestations of a civilized judicial system are firmly imbedded in our law."

Actions brought under the Federal Employers' Liability Act are actions at law. The instant action is one in equity and "The exceptions [to the normal assumption of jurisdiction] relate to the discretionary powers of courts of equity." *Meredith* v. *City of Winter Haven, supra,* 320 U. S. at 325.

Section 51 of the Judicial Code, 28 U. S. C. §112, in providing that "suit shall be brought only in the district of the residence of either the plaintiff or the defendant", merely imposes a limitation upon plaintiff's freedom of choice. It does not, as the lower courts correctly held, confer an absolute right to maintain suit in the district of his residence.

Petitioner's brief, in addition to its claim of "absolute right", presses a construction of the decision of this Court in the *Williams* case that would construe as *dictum* the entire discussion of "vexatious or oppressive" litigation. The petition urges (pp. 6-7) that where (a) the suit is one for a money judgment and (b) no other aspect of the case involves the internal affairs of a foreign corporation, it must follow that forum non conveniens becomes inapplicable.

As we read this Court's decision in the *Williams* case, the applicability of the doctrine of forum non

conveniens is to be tested by the existence of either of two elements: (a) where the relief sought is "so extensive" or calls for "such detailed and continuing supervision that the matter could be more efficiently handled nearer home" or where the effectiveness of the decree would be doubtful; and (b) those elements relating to whether the litigation would be "vexatious or oppressive" if allowed to proceed to trial in the forum. We do not understand that both groups of elements must exist concurrently. To the contrary, we view the *Williams* case as deciding that the decision of the District Court might have been sustained by the presence of either. If petitioner's construction is correct, once this Court had concluded that the internal affairs of a foreign corporation were not involved, it was gratuitous and unnecessary to proceed to the discussion of the "vexatious or oppressive" phase of the case.

If our construction of the *Williams* case is correct, we would apply it to the instant case as stated below.

**The Williams Case: The Test of "Internal Affairs".**

It is respondent's contention that the instant case is one which relates to the internal management of its business, even though the complaint ostensibly seeks only a money judgment.* The *Williams* case is not to the contrary for it merely declares that where a money judgment only is sought in a representative suit, the case "normally" is one to which the rule of forum non conveniens is not applied (90 L. ed. at 251).

The second cause of action (R. 6-8) furnishes ex-

* Respondent has never conceded, as petitioner blandly asserts (Petition, p. 6), that internal affairs are not involved.

cellent illustration of proposed interference with internal management, though money only is demanded. It is there alleged that Lumbermens maintains branch offices staffed with its employees throughout the country; it advertises and entertains broker contacts; it solicits and writes insurance without benefit of an agency; by reason thereof it has the facilities to carry on business without employing Kemper & Co.; and finally

> "Lumbermen's could have secured the same amount of business and could have conducted it with equal efficiency without employing and paying for the purported services of Kemper & Co."

Here petitioner seeks to have a court decide whether Lumbermens should acquire its insurance business primarily through the use of agents or brokers or primarily through the use of its own facilities. It is a matter of common knowledge, which this Court may judicially notice, that insurance is customarily written through the medium of agents and brokers. Nevertheless, petitioner seeks to have a court find that Lumbermens could have operated "with equal efficiency" by employing only its own personnel and facilities. Necessary consequences of such a finding would be (1) the dictation of the corporation's future operations methods; and (2) a present and direct interference with the corporation's business. The fact that the sanction applied is a money award, rather than the force of an injunction, does not change the internal effect of the determination.

Under the law of respondent's domicile, it has been squarely held that an accounting such as that sought under petitioner's second cause of action constitutes

an interference with an insurance corporation's business. *People ex rel. Benefit Association of Railway Employees* v. *Miner*, 387 Ill. 393 (1944), cert. denied 324 U. S. 840 (1945).

The *Miner* case involved a derivative action by a policyholder of a mutual insurance organization on behalf of the organization and its policyholders against its officers and directors. It was alleged that the individual defendants had a financial interest in the contract between the insurer and its underwriting agent; that excessive commissions were paid to the agency by the association; that the agency used the office and employees of the association without proper compensation therefor; that the directors of the association who authorized payments of commissions to the agents eventually received this money as partners of the agency and fraudulently diverted it to themselves.

The prayer for relief demanded that the individual defendants be removed from office and declared ineligible for re-election, and that they be required to account for the company's money disbursed by them to the agency. Acknowledging that "It is conceivable that an accounting may be sought or had, or claim prosecuted which would in nowise interfere with the business of the company, such as an agent's suit for accounting as to commissions", the Supreme Court of Illinois nevertheless held that the accounting therein sought would clearly interfere with the business of the company and therefore would not be granted at the request of a private suitor (387 Ill. at 401). This conclusion was specifically reaffirmed in *People ex rel. Parkinson* v. *Williams*, 392 Ill. 224, 240-1 (1945).

**The Williams Case: Test of "Vexatious or Oppressive".**

Even if it be assumed that the action does not relate to respondent's internal affairs, nevertheless the District Court had discretion to dismiss the action on the ground that its maintenance in the Eastern District of New York was vexatious or oppressive. As this Court stated in the *Williams* case:

> "We mention this phase of the matter to put the rule of forum non conveniens in proper perspective. It was designed as an 'instrument of justice'. Maintenance of a suit away from the domicile of defendant—whether he be a corporation or an individual—might be vexatious or oppressive. * * * Each case turns on its facts" (90 L. ed. at 250, 252).

Moreover, as the Circuit Court pointed out (R. 47), the last paragraph of the opinion in the *Williams* case implicitly recognizes that jurisdiction should be declined if maintenance of the suit will be vexatious or oppressive, and enumerates the determinative factors.

## POINT II.

**On the undisputed facts, the District Court properly exercised its discretion.**

Respondent does not contend, as petitioner would have it appear, that mere convenience to parties and to witnesses renders the choice of a particular forum vexatious or oppressive. Respondent does contend, however, that the circumstances can be such that maintenance of a suit in a particular forum would be so unjust that the forum will not retain it and that the instant suit involves such circumstances.

The considerations of "convenience, efficiency and justice" which have furnished the guides to discretion in determining whether or not jurisdiction is properly invoked are many and varied. They include:

The convenience or inconvenience to parties, the practical necessities of obtaining production of documents and witnesses (*Williams* v. *Green Bay & Western R. R.*; *Rogers* v. *Guaranty Trust Co.*, both *supra*; *Hirshhorn* v. *Mine Safety Appliance Co.*, 54 F. Supp. 588, 591 (W. D. Pa., 1944); *Grismer* v. *Merger Mines Corp.*, 43 F. Supp. 990, 993 (E. D. Wash., 1942), Note (1937) 50 Harvard Law Review 1119, 1181);

The amenability to process of the alleged wrongdoers (*Rogers* v. *Guaranty Trust Co.*; *Hirshhorn* v. *Mine Safety Appliance Co.*; *Grismer* v. *Merger Mines Corp.*, all *supra*; *Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76, 78 (C. C. A. 1st, 1943); *Overfield* v. *Pennroad*, 113 F. (2d) 6 (C. C. A. 3d, 1940); *Saltz* v. *Saltz Bros.*, 84 F. (2d) 246 (App. D. C. 1936); *Miller* v. *Quincy*, 179 N. Y. 294 (1904); *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (2d Dep't 1899);

The effectiveness of injunctive or other relief that may be granted and the possibility that the domiciliary courts will render an inconsistent—and controlling—decree (*Williams* v. *Green Bay & Western R. R.*; *Rogers* v. *Guaranty Trust Co.*; *Kelley* v. *American Sugar Refining Co.*; *Grismer* v. *Merger Mines Corp.*, all *supra*; *Healey* v. *Reynolds Tobacco Co.*, 48 F. Supp. 207 (M. D. N. C., 1942); *Sauerbrunn* v. *Hartford Life Insurance Co.*, 220 N. Y. 363 (1917);

The availability of an equally adequate remedy in the jurisdiction where the parties, the records and the witnesses are located (*Rogers* v. *Guaranty*

*Trust Co.; Kelley* v. *American Sugar Refining Co.; Healey* v. *Reynolds Tobacco Co.*, all *supra; Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111 (C. C. A. 2d, 1942); and

The fact that a similar suit for the same relief is pending in a court of the corporation's domicile (*Cohen* v. *American Window Glass Co.; Healey* v. *Reynolds Tobacco Co.*, both *supra; cf. Pennsylvania* v. *Williams, supra*).

Upon the basis of the above factors, and upon the uncontroverted facts set forth in the moving affidavits (R. 19-28) and summarized above,* the District Court, finding that it would be most unjust to require the defendant to meet the issues in the Eastern District of New York, held that considerations of convenience, efficiency and justice demanded that it refuse to retain jurisdiction.

Any remaining doubt as to the propriety of the District Court's exercise of its discretion, however, has been dispelled by a circumstance which arose subsequent to the judgment of the District Court dismissing the action and subsequent to the argument of petitioner's appeal from that judgment before the Circuit Court of Appeals, but prior to that Court's decision of the judgment of affirmance.

**Schwartz v. Kemper, et al.**

On January 18, 1946, a derivative suit against Lumbermens and the individuals constituting its present Board of Directors was instituted in the United States District Court for the Northern District of Illinois, Eastern Division, by a policyholder of the

* Pages 4-7.

company.* All defendants with the exception of Harry E. Stone, a citizen of Massachusetts, and L. G. Purmort, a citizen of Ohio, have entered a general appearance and are subject to the jurisdiction of the Court. A certified copy of the complaint in that action is annexed to this brief as Appendix A. It will readily be seen that the acts and transactions complained of in the *Schwartz* action are substantially identical with those complained of by petitioner herein, and that the relief sought in that action is identical with the relief sought by petitioner.

*The First Cause of Action.* The first cause of action is identical with that in petitioner's complaint, with this exception: It has been expanded to include compensation paid to defendant Kemper in 1943 and 1944, and relief is sought not merely against Kemper but also against his fellow directors.

*The Second Cause of Action.* This cause of action is identical with the second cause of action in petitioner's complaint with the following exception: The individual members of the Board of Directors of Lumbermens have been substituted in place of Kemper & Co. of Illinois as co-defendants.

*The Third and Fourth Causes of Action.* These are identical with the third and fourth causes of action set forth in the petitioner's complaint, with the following exception: They have been expanded to include additional transactions of the same nature

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* *Louis J. Schwartz* v. *James S. Kemper, Mark Kemper, H. G. Kemper, James D. Cunningham, L. G. Purmort, Harry E. Stone, Harry A. Wheeler and Lumbermens Mutual Casualty Company*, N. D. Ill. (E. D.) No. 46C96. (American) Lumbermens Mutual Casualty Company and Lumbermens Mutual Casualty Company are one and the same organization. The prefix "(American)" has long been used in the State of New York to prevent confusion with a local insurance company having a similar name.

alleged to have occurred in 1944, and relief is sought not merely against Kemper but also against his fellow directors.

*The Attorneys.* Counsel upholding petitioner's position in the Eastern District Court and the Circuit Court of Appeals were Messrs. Abraham L. Pomerantz and William E. Haudek, of the New York Bar (R. 29, 30, 42, 51). In the *Schwartz* action, Mr. Pomerantz appears as an attorney of record (see Appendix A, p. 33) and Mr. Haudek has appeared of counsel in proceedings already had therein.

By the institution of the *Schwartz* action, the negligible expense which would have been entailed by petitioner in bringing his action in Illinois has been even further decreased. He has been afforded an opportunity not only to intervene, but even to be represented "by a lawyer whom he knows and in whom he has confidence" (Petition, p. 16). It is thus obvious that the action instituted in the Eastern District of New York is quite unnecessary to safeguard his rights. *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111, 114 (C. C. A. 2d, 1942); *Healey* v. *R. J. Reynolds Tobacco Co.*, 48 F. Supp. 207, 209 (M. D. N. C., 1942).

## POINT III.

**The District Court was not bound by state law to accept jurisdiction.**

Neither the District Court nor the Circuit Court of Appeals was called upon to decide whether a District Court may, in a diversity case, decline jurisdiction where, upon identical facts, jurisdiction would have been retained by a state court. The Circuit Court of

Appeals did not hold, as petitioner erroneously claims (Petition, p. 4), that had this action been brought in the New York State courts, jurisdiction would be mandatory. That Court merely footnoted in passing that "* * * it is interesting to note that the New York courts would not have declined jurisdiction had this been a derivative suit by a *shareholder* in a *stock* corporation." (R. 44-45, n. 2). (Italics supplied.)

The instant action, however, is not a derivative suit by a shareholder in a stock corporation and does not even raise the question decided in *Weiss* v. *Routh*, 149 F. (2d) 193 (C. C. A. 2d, 1945) and *Gilbert* v. *Gulf Oil Corporation*, 153 F. (2d) 883 (C. C. A. 2d, 1946), cert. granted May 20, 1946.

Petitioner cites no cases in support of his position that the New York courts would have retained jurisdiction of the instant action for the simple reason that there are none. In no other state is the distinction between stockholder and policyholder more clearly defined than in New York. Basically, a policyholder in a mutual insurance corporation is a contract creditor. *Seigel* v. *Prudential Insurance Co.*, 286 N. Y. 618 (1941). His rights are curtailed by the peculiar nature of his relationship with the corporation. *People ex rel. Venner* v. *New York Life Insurance Co.*, 111 App. Div. 183, 186-7 (1st Dep't, 1906). And he may not maintain a derivative action until the administrative remedy available to him has been exhausted. *Clifford* v. *Metropolitan Life Insurance Co.*, 264 App. Div. 168 (2d Dep't, 1942), where it was the Court's unanimous decision that

> "If it be assumed that a policyholder may maintain a derivative action, he must at least show

that he has exhausted all other available remedies and that the cause is so meritorious in nature that the failure of the directors to have prosecuted it was tantamount to a breach of duty. (*Isaac* v. *Marcus*, 258 N. Y. 251.) Plaintiffs do not allege that they called upon the State Superintendent of Insurance to exercise his powers pursuant to section 28 of the Insurance Law or to enjoin the conspirators as service organizations. (Insurance Law, §§34, 182, 180, subd. 6.) It was incumbent upon them to do so as a prerequisite to the maintenance of this action, and it is no answer to urge that the Superintendent of Insurance was not obliged to comply with their request * * *" (264 App. Div. at 170).

In view of the fact that the courts of New York have voiced their disapproval of similar actions against domestic mutual insurance corporations, there is no ground for the petitioner's contention that such actions would be entertained if brought in those courts against a foreign mutual insurance corporation. Specifically, there is no ground for petitioner's contention that jurisdiction over the instant action would have been retained, had it been brought in the state courts. To hold that the District Court should have retained jurisdiction would be to create a new right in a State whose courts have denied its existence.

## Conclusion.

The decision of the Second Circuit, far from being "a far-reaching innovation in the law of Federal jurisdiction and venue" (Petition, p. 6) is in complete accord with the recent decision of this Court in the *Williams* case. It represents a careful application of

the principle of forum non conveniens in precisely the sort of situation where, as an instrument of justice, it should be applied. Without injuring plaintiff, and without favoring defendants, it provides a place of trial that will harm least and benefit most the interests of the entire body of Lumbermens policyholders.

It is respectfully submitted that the petition be denied.

Respectfully submitted,

STUART N. UPDIKE,
*Attorney for Respondent.*

EDWARD M. MAHER,
FRANK W. GLENN,
*Of Counsel.*

## APPENDIX A.

### Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

**Civil Action, File Number 46C96**

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LOUIS J. SCHWARTZ,

Plaintiff,

—vs—

JAMES S. KEMPER, MARK KEMPER, H. G. KEMPER, JAMES D. CUNNINGHAM, L. G. PURMORT, HARRY E. STONE, HARRY A. WHEELER and LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendants.

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Plaintiff, for his complaint, alleges on information and belief, except Paragraphs "1(a)", "1(g)", "1(h)" and "2", which he alleges on knowledge:

AS A FIRST CAUSE OF ACTION:

1. (a) Plaintiff is a citizen of the State of New York.

(b) Defendant Lumbermens Mutual Casualty Company ("Lumbermens" hereafter), incorporated in 1912, was at all times since and now is a mutual insurance corporation organized under the laws of the State of Illinois.

(c) The defendants James S. Kemper, Mark Kemper, H. G. Kemper, James D. Cunningham and Harry A. Wheeler are citizens of the State of Illinois.

(d) The defendant Harry E. Stone is a citizen of the Commonwealth of Massachusetts.

(e) The defendant L. G. Purmort is a citizen of the State of Ohio.

(f) The jurisdiction of the court depends on diversity of citizenship.

(g) The amount in controversy, exclusive of interest and costs, exceeds Three Thousand Dollars ($3,000.00).

(h) The action is not a collusive one to confer on a court of the United States jurisdiction of an action of which it would not otherwise have jurisdiction.

2. (a) Since June, 1937, plaintiff has been and he now is a member and policy holder of Lumbermens.

(b) Plaintiff brings this action in the right of Lumbermens and on behalf of all its members and policy holders.

3. (a) The individual defendants constitute the present Board of Directors of Lumbermens.

(b) The directors of Lumbermens from 1925 to date and their times of tenure are listed in Schedule "A" annexed hereto.

4. (a) From 1916 to date James S. Kemper has been and he now is the General Manager and Chairman of the Board of Directors of Lumbermens.

(b) From 1916 to May, 1945, James S. Kemper was also the President of Lumbermens; in May, 1945, he resigned as President and the defendant H. G. Kemper became, and he still is, the President of Lumbermens.

(c) By reason of family relation, friendship and business association, the other directors and officers of Lumbermens were at all times herein mentioned and still are dominated and controlled by James S. Kemper in such

manner that they were and are subservient to his wishes and directions without regard to the best interests of Lumbermens.

(d) By reason of the premises James S. Kemper did at all times herein mentioned and still does dominate and control the management, personnel and business policies of Lumbermens.

(e) The acts and omissions of Lumbermens herein after alleged were caused by James S. Kemper.

5. Prior to 1942, the aggregate salary and other compensation paid by Lumbermens to James S. Kemper were less than $75,000.00 per year.

6. (a) For the year 1942, Lumbermens paid James S. Kemper salary and other compensation aggregating $251,543.63, an increase of more than 235 per cent over the preceding year.

(b) For the year 1943, Lumbermens paid James S. Kemper salary and other compensation aggregating $250,000.00.

(c) For the year 1944, Lumbermens paid James S. Kemper salary and other compensation aggregating more than $250,000.00.

7. Such salary and other compensation for the years 1942, 1943 and 1944 were in excess of the reasonable value of James S. Kemper's services because:

(a) The amounts paid to James S. Kemper prior to 1942 were full and adequate compensation for his services; were so determined by the Board of Directors of Lumbermens; and were so recognized and accepted by James S. Kemper;

(b) The extent of James S. Kemper's services in 1942, 1943 and 1944 was not in excess of those in 1941 and prior years;

(c) The actual cash gross earnings of Lumbermens in 1942 exceeded those in 1941 by only 6.78 per cent; in 1943 and 1944 they fell below those in 1941 by 8.36 per cent and 4.06 per cent, respectively;

(d) The net income of Lumbermens in 1942 exceeded that in 1941 by only 12.25 per cent; in 1943 it fell below that in 1941 by 25.54 per cent; and in 1943 it exceeded that in 1941 by only 10.04 per cent;

(e) The 1942, 1943 and 1944 salaries and other compensation of other managing executives, holding positions comparable to those of James S. Kemper in insurance companies similar to Lumbermens, were not substantially increased over those for the preceding years, except to the extent of reflecting promotions in individual cases;

(f) In the years 1942, 1943 and 1944 the highest aggregate amount of salary and other compensation paid by any insurance company in the United States to its principal executive was less than one-half of that paid by Lumbermens to James S. Kemper;

(g) James S. Kemper did not devote his full time and services to Lumbermens, but occupied executive positions in several other insurance companies and agencies not affiliated with Lumbermens.

8. To the extent that the 1942, 1943 and 1944 payments of Lumbermens to James S. Kemper were in excess of his compensation for the year 1941, they were without consideration and constituted a gift of corporate assets.

9. (a) The individual defendants authorized the aforesaid payments to James S. Kemper with knowledge of the facts alleged in Paragraphs "5" through "8".

(b) In authorizing these payments they failed to exercise honest judgment and were motivated by the interest of James S. Kemper rather than by that of Lumbermens.

(c) The facts alleged in Paragraphs "5" through "8" and in the two preceding subdivisions of this paragraph were never revealed to the members and policy holders of Lumbermens, either in the notices of meetings or in the annual reports sent to them.

10. By reason of the premises, Lumbermens has sustained substantial damages.

11. Demand by plaintiff that the Board of Directors of Lumbermens bring this action was not made, and would have been futile, because:

(a) The members of the Board of Directors are dominated and controlled by James S. Kemper;

(b) They have remained inactive although they have long had knowledge of the acts herein alleged;

(c) They participated in the wrongs herein alleged;

(d) They would not and could not have diligently prosecuted this action because, in effect, they would have had to bring it against themselves.

12. Plaintiff has no adequate remedy at law.

AS A SECOND CAUSE OF ACTION:

13. Plaintiff realleges Paragraphs "1" through "4".

14. (a) James S. Kemper & Co., Inc. ("Kemper & Co." hereafter), incorporated in 1927, was at all times since and now is a corporation organized under the laws of the State of Delaware.

(b) At all times since its organization, James S. Kemper and family members, friends, associates, agents and employees of his held and still hold all or the majority of the capital stock of Kemper & Co.

(c) By reason of the premises, James S. Kemper did during all such times and still does dominate and control the management, personnel and business policies of Kemper & Co.

(d) During all such times James S. Kemper and members of his family had and they still have the beneficial enjoyment of all or the major portion of the profits of Kemper & Co.

15. At all times since its organization Kemper & Co. has been engaged in business as an insurance agent.

16. (a) During all such times Lumbermens employed Kemper & Co. as its agent for the transaction of insurance business in various parts of the United States.

(b) During all such times Lumbermens paid substantial sums to Kemper & Co. as commissions, fees and otherwise.

17. (a) During all such times and since prior to 1927, Lumbermens did and it still does maintain branch offices staffed with its own employees throughout the United States, engage in extensive advertising campaigns, entertain numerous brokerage contacts, and solicit and write insurance without the intervention of a separate or independent agency.

(b) By reason of the premises Lumbermens had and still has the organization, personnel, equipment, facilities and business connections to carry on its business and sell insurance without employing the services of Kemper & Co.

(c) Lumbermens could have secured the same amount of business and could have conducted it with equal efficiency, without employing and paying for the purported services of Kemper & Co.

18. (a) The directors, officers, executives and certain employees of Kemper & Co. were at all times herein men-

tioned and still are directors, officers, executives or employes of Lumbermens.

(b) At all times herein mentioned the office space used or occupied by Kemper & Co. throughout the United States was and still is part of the office space owned or rented by Lumbermens.

(c) At all times herein mentioned Kemper & Co. did and it still does use the organization, personnel, assets and facilities of Lumbermens in the conduct of its business.

(d) Kemper & Co. paid Lumbermens no consideration for the use of its organization, personnel, assets and facilities.

19. (a) The individual defendants authorized and approved Lumbermens' transactions with Kemper & Co. with full knowledge of the matters alleged in Paragraphs "14" through "18".

(b) In authorizing and approving these transactions, they failed to exercise honest judgment and were motivated by the interest of James S. Kemper rather than by that of Lumbermens.

20. (a) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(b) The members and policy holders have remained ignorant of such facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

21. (a) By reason of the premises Lumbermens sustained substantial damage and James S. Kemper and members of his family derived substantial profits.

(b) The precise amounts of such damage and profits being unknown to plaintiff, an accounting therefor by the defendants other than Lumbermens is necessary.

22. Plaintiff realleges Paragraphs "11" and "12".

AS A THIRD CAUSE OF ACTION:

23. Plaintiff realleges Paragraphs "1" through "4".

24. (a) On or about January 29, 1926, Lumbermens caused American Motorists Insurance Co. ("Motorists" hereafter) to be organized as a stock corporation under the laws of the State of Illinois.

(b) From its organization to date, Motorists has been and it is engaged in the insurance business.

(c) By reason of the sponsorship by Lumbermens, Motorists partook of the prestige, trade acceptance and goodwill enjoyed by Lumbermens and had access to its business connections and brokerage contacts.

25. (a) From the organization of Motorists to December 30, 1927, Lumbermens held 11,566⅔ shares of stock of Motorists out of a total of 11,666⅔ shares issued.

(b) From December 30, 1927, to December 31, 1944, Lumbermens acquired an aggregate of 11,709⅔ shares and sold an aggregate of 15,385⅔ shares of Motorists.

26. (a) Lumbermens received for the 15,385⅔ shares of stock of Motorists sold from December 30, 1927, to December 31, 1944, a total aggregate price of $937,163.62.

(b) The names of the purchasers, the dates of the sales, the numbers of shares sold, the price of each sale and the liquidating value per share at such dates are listed in Schedule "B" annexed hereto.

27. (a) The individuals to whom Lumbermens sold the shares of Motorists, as aforesaid, were directors or officers of Lumbermens, their family members, friends and business associates.

(b) The officers and directors of the corporations to which Lumbermens sold stock of Motorists, as aforesaid,

were also officers or directors of Lumbermens, or family members, friends or associates of officers or directors of Lumbermens.

(c) James S. Kemper was an officer and director of each such corporation.

28. The prices at which Lumbermens sold the shares of Motorists, as aforesaid, were inadequate because:

(a) The aggregate liquidating value of said shares, at the respective times of the sale thereof, was $162,113.72 greater than the prices paid therefor;

(b) The aggregate true value of said shares, at the respective times of the sale thereof, was substantially greater than their liquidating value;

(c) Said shares were not publicly traded and had no established market value.

29. (a) The individual defendants authorized and approved the aforesaid sales with knowledge of the matters alleged in Paragraphs "24" through "28".

(b) In authorizing and approving these sales, the individual defendants failed to exercise honest judgment and were motivated by the interest of the purchasers rather than by that of Lumbermens.

30. (a) The individual defendants caused the sale pursuant to a conspiracy entered into from time to time among themselves and the purchasers.

(b) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(c) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

31. In authorizing and approving these sales, the individual defendants did not safeguard the interests of Lumbermens with the care and diligence of a reasonably prudent business man.

32. (a) From 1930 through 1944, annual cash dividends aggregating $33.30 were paid on each share of Motorists.

(b) In 1943 a 33⅓ per cent stock dividend was distributed on each share of Motorists.

(c) The aforesaid purchasers of stock of Motorists either retain such stock or have resold it at a profit; the exact dispositions are unknown to plaintiff and must be disclosed by an accounting.

(d) The present liquidating value of each share of Motorists, after giving effect to the stock dividend, is $116.93; the true value of each such share is substantially greater.

33. By reason of the premises, Lumbermens sustained damages in excess of $1,000,000 and the purchasers of said shares realized profits substantially in excess of such loss.

34. Plaintiff realleges Paragraphs "11" and "12".

As a Fourth Cause of Action:

35. Plaintiff realleges Paragraphs "1" through "4".

36. Since prior to August 1, 1942, National Retailers' Mutual Insurance Company ("Retailers' Mutual" hereafter) has been and it now is a mutual insurance company incorporated under the laws of the State of New York.

37. (a) Prior to August 1, 1942, Retailers' Mutual is

sued and sold $375,000 principal amount of its Guarantee Fund Debentures.

(b) By the terms of each of said debentures, Retailers' Mutual undertook to pay in perpetuity at least 5 per cent interest annually upon the principal amount thereof.

(c) By the terms of each of said debentures, the principal amount thereof was and is not redeemable or callable by Retailers' Mutual, except upon the dissolution of Retailers' Mutual.

38. On or about August 1, 1942, Lumbermens owned and held $225,000 principal amount of the Guarantee Fund Debentures of Retailers' Mutual.

39. (a) On or about August 1, 1942, and at various dates thereafter, Lumbermens sold an aggregate of $175,000 principal amount of said debentures.

(b) Upon each such sale the purchase price was equal or substantially equal to the principal amount of the Guarantee Fund Debentures thus sold.

(c) The approximate dates of such sales, the names of the purchasers, the amounts of debentures sold, and the prices paid therefor are listed in Schedule "C" annexed hereto.

40. (a) The individuals to whom Lumbermens sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were directors or officers of Lumbermens, their family members, friends and business associates.

(b) The officers and directors of the corporations to which Lumbermens sold Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were also officers and directors of Lumbermens, or family members, friends or associates of officers or directors of Lumbermens.

(c) James S. Kemper was an officer and director of each such corporation.

41. The prices at which Lumbermens sold the Guarantee Fund Debentures of Retailers' Mutual, as aforesaid, were inadequate because:

(a) Said debentures bore interest at the rate of 5 per cent annually;

(b) Their security was equal to, or better than, the security of corporate bonds of the highest grade investment rating;

(c) Such security rested upon the facts, among others, that the net assets of Retailers' Mutual (substantially all of which were liquid) had and have a value of more than four times the total amount of said debentures outstanding; and that the annual net earnings of Retailers' Mutual were and are more than twelve times the amount of the annual interest payable on such debentures;

(d) Bonds or debentures of comparable security, bearing a similar rate of return and having analogous redemption and other features, were at the time of these sales traded at prices approximately equal to 200 per cent of par;

(e) The fair and reasonable value of the aforesaid Guarantee Fund Debentures, at the time of each of said sales, was not less than 200 per cent of par.

42. (a) The individual defendants authorized and approved these sales with knowledge of the matters alleged in Paragraphs "36" through "41".

(b) In authorizing and approving these sales, the individual defendants failed to exercise honest judgment and were motivated by the interest of the purchasers rather than by that of Lumbermens.

43. (a) The individual defendants caused these sales pursuant to a conspiracy entered into from time to time among themselves and the purchasers.

(b) The individual defendants concealed the facts herein alleged from the members and policy holders of Lumbermens.

(c) The members and policy holders have remained ignorant of said facts, except that plaintiff discovered them in 1945, shortly before the commencement of this action.

44. In authorizing and approving these sales, the individual defendants did not safeguard the interests of Lumbermens with the care and diligence of a reasonably prudent business man.

45. By reason of the premises, Lumbermens sustained damages in excess of $175,000.

46. Plaintiff realleges Paragraphs "11" and "12".

WHEREFORE, plaintiff demands judgment:

I. Requiring the individual defendants to account to Lumbermens for the damages and profits alleged herein, with interest;

II. Awarding plaintiff the costs and expenses of this action, including reasonable counsel and accountants' fees; and

III. Granting plaintiff such other and further relief as may be just.

LOUIS J. SCHWARTZ
Plaintiff

M. J. MYER & NOLAN H. TEPPER
M. J. Myer and Nolan H. Tepper
77 West Washington Street
Randolph 0132

A. L. POMERANTZ
A. L. Pomerantz
295 Madison Avenue
New York 17, New York.

State of New York
County of New York—ss

LOUIS J. SCHWARTZ, being first duly sworn upon oath, deposes and says that he is the plaintiff in the above and foregoing complaint by him subscribed; that he has read the same and knows the contents thereof, and that the same is true except for such matters as are therein stated to be upon information and belief, which matters he believes to be true.

LOUIS J. SCHWARTZ

Subscribed and sworn to before me this
4 day of January, 1946.

H. WM. TANNENBAUM
Notary Public

H. WM. TANNENBAUM
Notary Public
Kings Co. Clk's No. 44, Reg. No. 48-T-5
N. Y. Co. Clk's No. 140, Reg. No. 55-T-5
Commission Expires March 30, 1946

## SCHEDULE A

### Directors of Lumbermens From 1925 to Date

| Name | Tenure | |
|---|---|---|
| | From | Through |
| H. W. Chandler | 1925 | 1930 |
| E. W. Dierssen | 1925 | 1931 |
| G. J. Farnsworth | 1925 | 1940 |
| E. E. Hooper | 1925 | 1934 |
| H. G. Kemper | 1925 | to date |
| J. S. Kemper | 1925 | to date |
| C. A. L. Purmort | 1925 | 1930 |
| C. M. Purmort | 1931 | 1940 |
| H. E. Stone | 1932 | to date |
| H. A. Wheeler | 1936 | to date |
| Mark Kemper | 1936 | to date |
| L. G. Purmort | 1941 | to date |
| James D. Cunningham | 1941 | to date |

## SCHEDULE B

### Sales by Lumbermens of Stock of Motorists

| Names of Purchasers | Date of Sale | No. Shares Sold | Price Per Share | Total Proceeds of Sales | Liquidating Value Per Share | Excess of Liquidating Value Per Share Over Price Per Share | Total Excess of Liquidating Value Over Proceeds |
|---|---|---|---|---|---|---|---|
| Chandler, Farnsworth and Kemper | 12/30/27 | 5,500 | $53.47 | $294,119.18 | $ 53.52 | $ .05 | $ 14,705.95 |
| H. G. Kemper | 4/12/29 | 125 | 63.4[illegible] | 7,931.43 | 63.45 | .... | ..... |
| Commercial Mutual Underwriting Corp. | 12/30/31 | 8,406⅔ | 65.00 | 546,433.33 | 73.25 | 8.25 | 69,358.00 |
| National Illinois Corporation | 9/16/35 | ⅔ | 62.00 | 41.34 | 89.43 | 27.43 | 18.29 |
| Mrs. Gertrude Z. Kemper | 3/31/37 | 30 | 70.00 | 2,100.00 | 108.24 | 38.24 | 1,147.20 |
| H. J. Giffing | 3/31/37 | 5 | 70.00 | 350.00 | 108.24 | 38.24 | 191.20 |
| R. H. Campbell | 3/31/37 | 5 | 70.00 | 350.00 | 108.24 | 38.24 | 191.20 |
| A. H. Stringe | 3/31/37 | 35 | 70.00 | 2,450.00 | 108.24 | 38.24 | 1,338.40 |
| Harry A. Wheeler | 3/31/37 | 25 | 70.00 | 1,750.00 | 108.24 | 38.24 | 956.00 |
| W. B. Morrell | 3/31/37 | 15 | 70.00 | 1,050.00 | 108.24 | 38.24 | 573.60 |
| H. W. Lunsche | 4/7/37 | 7 | 70.00 | 490.00 | 108.24 | 38.24 | 267.68 |
| J. C. Wilson | 4/22/37 | 10 | 70.00 | 700.00 | 108.24 | 38.24 | 382.40 |
| Frank J. Heitman | 4/26/37 | 70 | 70.00 | 4,900.00 | 108.24 | 38.24 | 2,676.80 |
| American Motorists Insurance Co. | 4/28/37 | 2 | 30.00 | 60.00 | 108.24 | 78.24 | 156.48 |
| National Retailers Mutual Insurance Co. | 4/30/37 | 50 | 70.00 | 3,500.00 | 108.24 | 38.24 | 1,912.00 |
| J. E. Magnus | 4/19/39 | 25 | 69.00 | 1,725.00 | 116.80 | 47.80 | 956.00 |
| R. J. Dunn | 8/1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Chase M. Smith | 8/1/42 | 75 | 66.67 | 5,000.00 | 135.69 | 69.02 | 5,176.50 |
| Gertrude Z. Kemper | 8/1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Charles E. Good | 8/1/42 | 75 | 66.67 | 5,000.00 | 135.69 | 69.02 | 5,176.50 |
| Norris C. Flanagin | 8/1/42 | 115 | 66.67 | 7,666.67 | 135.69 | 69.02 | 7,937.30 |
| Robert H. Campbell | 8/1/42 | 30 | 66.67 | 2,000.00 | 135.69 | 69.02 | 2,070.60 |
| Edward S. Beck (Dec'd) | 8/1/42 | 70 | 66.67 | 4,666.67 | 135.69 | 69.02 | 4,831.40 |
| Marie J. Rowe | 8/1/42 | 38 | 66.67 | 2,533.33 | 135.69 | 69.02 | 2,622.76 |
| Dwight S. Bobb | 8/1/42 | 150 | 66.67 | 10,000.00 | 135.69 | 69.02 | 10,353.00 |
| H. E. Stone | 8/1/42 | 100 | 66.67 | 6,666.67 | 135.69 | 69.02 | 6,902.00 |
| Central Mortgage Co. | 1943 | 11⅓ | 60.00 | 680.00 | 140.67 | 80.67 | 914.26 |
| Central Mortgage Co. | 1/19/44 | 100 | 60.00 | 6,000.00 | 109.02 | 49.02 | 4,902.00 |
| Central Mortgage Co. | 1/31/44 | 50 | 60.00 | 3,000.00 | 109.02 | 49.02 | 2,451.00 |
| Lumbermens Mutual Fire Insurance Co. of Boston | 3/3/44 | 200 | 60.00 | 12,000.00 | 109.02 | 49.02 | 9,804.00 |
| Totals | | 15,385⅔ | | $937,163.62 | | | $162,113.72 |

## SCHEDULE C

### Sales by Lumbermens of Guaranty Fund Debentures of Retailers Mutual

| Date | Names of Purchasers | Par Value of Debentures Sold | Consideration Received |
|---|---|---|---|
| 8/1/42 | Charles M. Purmort | $ 10,000.00 | $ 10,000.00 |
| 8/1/42 | Charles E. Good | 5,000.00 | 5,000.00 |
| 8/1/42 | Norris C. Flanagin, City National Bank and Trust Co. and Hathaway G. Kemper, Trustees No. T/A 22217 | 2,500.00 | 2,500.00 |
| 8/1/42 | Robert H. Campbell | 25,000.00 | 25,000.00 |
| 8/1/42 | Edward S. Beck | 3,000.00 | 3,000.00 |
| 8/1/42 | Vance C. Smith, Jr. | 5,500.00 | 5,500.00 |
| 8/1/42 | H. G. Kemper | 1,000.00 | 1,000.00 |
| 8/1/42 | Harry E. Stone | 9,000.00 | 9,000.00 |
| 8/1/42 | James S. Kemper | 3,500.00 | 3,500.00 |
| 8/1/42 | James S. Kemper & Co. | 4,000.00 | 4,000.00 |
| 8/1/42 | Marjorie B. Haviland | 20,000.00 | 20,000.00 |
| 8/1/42 | Joan Stover | 1,200.00 | 1,200.00 |
| 9/30/42 | Mary S. Kemper | 1,000.00 | 1,000.00 |
| 11/16/43 | Central Mortgage Co. | 5,600.00 | 5,600.00 |
| 1/20/43 | Central Mortgage Co. | 5,750.00 | 5,865.00 |
| 7/2/43 | Central Mortgage Co. | 7,000.00 | 7,140.00 |
| 12/12/44 | Central Mortgage Co. | 3,000.00 | 3,060.00 |
| 12/29/44 | Central Mortgage Co. | 2,000.00 | 2,040.00 |
| 12/30/44 | The James S. Kemper Foundation | 20,950.00 | 21,369.00 |
| | | 40,000.00 | 40,000.00 |
| | Totals | $175,000.00 | $175,774.00 |

United States of America
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Complaint (certificate of County Clerk and Clerk of the Supreme Court, New York County, re qualification of Notary Public to take oath of plaintiff omitted from this copy) filed January 16, 1946, in the case of Louis J. Schwartz vs. James S. Kemper, et al., No. 46 C 96, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 23rd day of July, A. D. 1946.

ROY H. JOHNSON
Clerk.

By S. M. Shepard
Deputy Clerk.

(Seal)

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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 206.

EUGÈNE KOSTER,

*Petitioner,*

—against—

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT.

STUART N. UPDIKE,
*Attorney for Respondent.*

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
LOUIS G. CALDWELL,
EDWARD M. MAHER,
*Of Counsel.*

THE COURT PRESS, N. Y. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 206.

EUGENE KOSTER,

*Petitioner,*

—against—

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT.

### The Opinions Below.

The opinion of the District Court (R. 30-37) is reported at 64 F. Supp. 595.

The opinions of the Circuit Court of Appeals (R. 42-49) are reported at 153 F. (2d) 888.

### Jurisdiction.

This Court granted certiorari to the Circuit Court of Appeals for the Second Circuit on October 14, 1946.

### Statement of the Case.

Petitioner, a citizen of New York residing in its Eastern District, has brought this derivative action, based on diversity, against (American) Lumbermens Mutual Casualty Company, a mutual insurance corporation organized under Illinois law (hereinafter

called "Lumbermens"). Petitioner alleges he has been a member and policyholder of Lumbermens since May, 1941; and sues on behalf of all its policyholders,* naming as defendants Lumbermens, James S. Kemper, a citizen and resident of Illinois and James S. Kemper & Co., Inc., an Illinois corporation (hereinafter called "Kemper & Co.").

**First Cause of Action.**

This cause (against defendants Kemper and Lumbermens) asserts that for 1942 Kemper received an unwarranted increase in salary and other compensation from Lumbermens and that to the extent of the increase over 1941, the payments were without consideration and constituted a gift of corporate assets (R. 3-6).

**Second Cause of Action.**

This cause (against all three defendants) claims that Kemper at all relevant times dominated and controlled the management, personnel and business policies of Lumbermens and of Kemper & Co.; that Kemper & Co. has received "unwarranted" commissions, fees and other payments for agency and other services in the transaction of insurance business for Lumbermens which Lumbermens could have rendered as efficiently for itself with its own organization, personnel and facilities; that Lumbermens "could have secured the same amount of business" without employing and paying Kemper & Co.; that Kemper & Co. employed Lumbermens' facilities and assets in the conduct of its business; that the precise amounts of damage to Lumbermens and of profits to others are un-

* Plaintiff is one of over 400,000 such policyholders (R. 3-4).

known to plaintiff; and that plaintiff is without adequate remedy at law (R. 6-8).

**Third and Fourth Causes of Action.**

The third and fourth causes (against defendants Kemper and Lumbermens) are parallel. They respectively allege that Kemper wilfully caused Lumbermens at various times to sell approximately 15,000 shares of stock and $112,050 principal amount of debentures out of Lumbermens' portfolio to himself and to others for sums substantially less than the true value of such securities; that the vendees were officers or directors of Lumbermens or their relatives, friends or business associates (R. 9-14).

**The Prayer.**

The plaintiff prays:

(1) That defendants in each cause of action, except Lumbermens, be required to account to Lumbermens for the alleged damages and profits, with interest;

(2) That plaintiff be awarded the costs and expenses of the action, including, of course, "reasonable counsel and accountants' fees" (R. 14).

Lumbermens, the only party properly before the District Court,* moved to dismiss the complaint on two grounds: forum non conveniens and absence of an indispensable party defendant. The motion was granted on the first ground (R. 37, 44) and this is the only ground before this Court.

* Defendant Kemper has never been served (R. 27).

On December 27, 1944 Kemper & Co. moved to dismiss on the grounds that (a) it was not qualified to do, and was not doing, business in New York State; and (b) it was not properly served. By order filed February 28, 1945, said motion was denied without prejudice as moot, in view of the prior determination which is the subject of this petition.

## The Facts.

The facts set forth in the moving papers were not challenged by denials from plaintiff, nor were affirmative facts brought forward by plaintiff to contradict or qualify the position of defendant Lumbermens presented by the moving affidavits (R. 19-28, 47). In short, it appeared:

(1) Lumbermens is a mutual insurance company, organized in 1912 in Illinois, where it has since continuously maintained its principal office (R. 20);

(2) Lumbermens is licensed by, and does business as an insurance corporation in, each one of the forty-seven non-domiciliary states, as well as in Canada (R. 21);

(3) Lumbermens has seven directors; five are citizens and residents of Illinois, having regular business addresses in Chicago; none are citizens or residents of New York (R. 21);

(4) All of the officers of Lumbermens are citizens and residents of Illinois, excepting the officers in the local state offices of the company across the country who have no personal knowledge and no information concerning the issues raised (R. 21);

(5) At the principal offices in Chicago are kept all of the general records and all of the control records relating to Lumbermens' business as an entity; by requirement of law* such records are kept available either there or in nearby warehouses (R. 21);

---

* Ill. Rev. Stat. (State Bar Ass'n Ed. 1943) c. 73, §745, provides: "(2) All such books, records, documents, and vouchers of the home office of any domestic [insurance] company * * * shall be preserved and kept available in this State * * *."

(6) All of the acts and transactions complained of took place in Illinois (R. 25).

Additional considerations before the District Court included:

(7) the transportation of large quantities of Lumbermens records from Chicago to the Eastern District, assuming that the provisions of Illinois law prohibiting removal were waived by the Director of Insurance of that State (R. 24);

(8) traveling expenses and subsistence of witnesses for examination before trial and, later, for the trial itself, including directors, officers and employees of Lumbermens, in addition to the officials and employees of the Illinois Department of Insurance, who have regularly audited Lumbermens books and regulated its affairs (R. 24);

(9) the extreme emergency existing with respect to transportation and hotel accommodations in New York City (R. 33);

(10) the loss of time to Lumbermens of those persons in its employ caused by a trial in a Federal court in New York, as contrasted with a trial in a Federal court in Illinois, with the attendant consequence of direct monetary loss and immeasurable damage to its day-to-day business and the necessity of hiring inexperienced substitute employees (R. 24);

(11) the inconvenience to the Court of construing the numerous provisions of the Illinois Insurance Code, as well as the many administrative regulations issued by the Insurance Department from time to time thereunder (R. 26);

(12) the injustice of imposing this expense on

Lumbermens, whether plaintiff is successful or unsuccessful (R. 23-24);

(13) the injustice of imposing this expense on Lumbermens, where there is but negligible cost and no inconvenience to plaintiff in remitting him to the Illinois courts. The only proof to come from plaintiff personally is that he is one of Lumbermens' 400,000 policyholders (R. 24-25);

(14) the injustice of requiring Lumbermens to defend in the forum of plaintiff's residence when plaintiff has never (a) attended any meeting of Lumbermens' policyholders, (b) written or spoken any criticism of the conduct of its affairs to its Board of Directors, (c) written or spoken any complaint or protest concerning any grievance, whether or not now complained of, to the Director of Insurance of Illinois or the Superintendent of Insurance of New York, although the insurance laws of both states clearly contemplate the filing of such complaints by policyholders, and where the total personal gain to plaintiff even if he succeeds would be trivial (R. 25).

Finding that, whether plaintiff or defendant should succeed on the merits, it would be "most unjust" to require Lumbermens to litigate the issues in the Eastern District of New York, the District Court granted respondent's motion and dismissed the action on the ground that considerations of convenience, efficiency and justice indicated that its jurisdiction should not be exercised (R. 37-38). The Circuit Court of Appeals has affirmed, on the ground that maintenance of the suit in New York would be so vexatious and oppressive as to offend those considerations (R. 48-9).

## The Questions Presented.

The sole questions presented are:

1. Had the District Court discretion to decline jurisdiction under the doctrine of forum non conveniens?

2. If so, was its discretion properly exercised on the undisputed facts?

## POINT I.

### The District Court had discretion to decline jurisdiction.

Petitioner contends (Brief, pp. 9-14) that by reason of §51 of the Judicial Code, 28 U. S. C. §112,* he has an "absolute right to sue in the district of his residence". This novel contention is without support in the authorities cited by petitioner or in any others of which we are aware.

The power of Federal courts, although jurisdiction exists, to decline its exercise in favor of a more appropriate forum, is firmly established.

*Williams* v. *Green Bay & W. R. R.*, 326 U. S. 549 (1946);
*Meredith* v. *City of Winter Haven*, 320 U. S. 228 (1943);
*Massachusetts* v. *Missouri*, 308 U. S. 1 (1939);
*Pennsylvania* v. *Williams*, 294 U. S. 176 (1935);

* This Section, so far as pertinent, provides: "* * * where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123 (1933);

*Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413 (1932).

Even in an ordinary situation, where non-derivative rights are concerned, the fact that plaintiff resides in the forum is not controlling. *International Milling Co.* v. *Columbia T. Co.*, 292 U. S. 511, 520 (1934). And in a derivative action, "The residence of the nominal plaintiff is unimportant since he is but the 'instigator' of the action on behalf of [the corporation]". *Chaplin* v. *Selznick*, 293 N. Y. 529, 532 (1944). Furthermore, despite §51 a plaintiff may bring suit in a district other than that in which either he or the defendant resides, since the defendant may waive the requirements of this Section of the Judicial Code.

*Baltimore & Ohio R. R.* v. *Kepner*, 314 U. S. 44 (1941) (Petitioner's Brief, p. 10), is not authority to the contrary. It involved a statute—the Federal Employers' Liability Act—which, in creating a right of action at law, created also a special venue privilege. "The privilege was granted because the general venue provisions worked injustices to employees" (314 U. S. at 53). Furthermore, as Mr. Justice Frankfurter stated in his dissent:

> "Nor does it [the majority opinion] question the familiar doctrine of forum non conveniens under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 422, 423, 76 L. ed. 837, 842, 843, 52 S. Ct. 413; *Massachusetts* v. *Missouri*, 308 U. S. 1, 19, 84 L. ed. 3,

10, 60 S. Ct. 39; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130, 131, 77 L. ed. 652, 656, 657, 53 S. Ct. 295, 89 ALR 720. These manifestations of a civilized judicial system are firmly imbedded in our law" (314 U. S. at 55).

Finally, the existence of the "absolute right" claimed by petitioner is negatived by *Williams* v. *Green Bay & W. R. R., supra.* If such a right existed, the entire discussion of forum non conveniens in that case would have been empty surplusage.

It is thus evident that, as the lower courts correctly held,* petitioner has no absolute right to maintain this suit in the Eastern District of New York.

## POINT II.

**The discretion of the District Court was correctly exercised.**

On the facts before it, the District Court was required to reach the conclusion it did; to have retained jurisdiction would, we think, have been an abuse of discretion. Certainly there was ample justification for the determination reached.

A review of this Court's decision in *Williams* v. *Green Bay & W. R. R., supra,* discloses that the standards of forum non conveniens to be applied fall under two concepts: "internal affairs", where a foreign corporation is involved, and "vexatious or oppressive", whether a corporation or an individual defendant is involved. Analysis of various presentations of legal

* Not even the dissenting judge below thought an absolute right existed.

periodicals* reveals widely varying fact situations to which the label "internal affairs" has been applied. Similarly, the words "vexatious" or "oppressive" and the phrase "convenience, efficiency and justice" have been applied to an almost endless variety of considerations—factual and legal—growing out of the needs in each particular case. Perhaps it was considerations such as these which led this Court in the *Williams* case, *supra*, to say: "Each case turns on its facts" (326 U. S. at 557). In this observation, the Court was not differing from the test applied by Judge Cardozo in *Travis* v. *Knox Terpezone Co.*, 215 N. Y. 259, 264 (1915) where the Court of Appeals observed:

> "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunals."

Respondent does not contend, as petitioner would have it appear, that mere inconvenience to parties and witnesses renders the choice of a particular forum vexatious or oppressive. Respondent does contend, however, that the circumstances can be such that maintenance of a suit in a particular forum would be so unfair that the forum will not retain it and that the instant suit involves such circumstances.

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* *E. g.*, Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 COLUMBIA LAW REV. 1; Note (1946) 46 COLUMBIA LAW REV. 413; Note (1937) 50 HARVARD LAW REV. 1119, 1181; Note (1929) 29 COLUMBIA LAW REV. 968, 971.

**The Criteria Applicable.**

The considerations of "convenience or of efficiency or of justice" which have furnished the guides to discretion in determining whether or not jurisdiction is properly invoked are many and varied. Respondent does not maintain that the presence or absence of any one consideration (except, perhaps, the absence of an available forum where plaintiff may have his day in Court) is determinative. They include:

The availability of an equally adequate remedy in the jurisdiction where the defendants, the records and the witnesses are located (*Rogers* v. *Guaranty Trust Co.; supra; Kelley* v. *American Sugar Refining Co.*, 139 F. (2d) 76, 78 (C. C. A. 1st, 1943), cert. denied 321 U. S. 794 (1944); *Healey* v. *Reynolds Tobacco Co.*, 48 F. Supp. 207 (M. D. N. C., 1942); *Cohen* v. *American Window Glass Co.*, 126 F. (2d) 111 (C. C. A. 2d, 1942); cf. *Williams* v. *Green Bay & W. R. R., supra*);

The fact that a similar suit for the same relief is pending in a court of the corporation's domicile (*Langfelder* v. *Universal Laboratories*, 293 N. Y. 200 (1944); *Cohen* v. *American Window Glass Co.*; *Healey* v. *Reynolds Tobacco Co.*, both *supra*; cf. *Pennsylvania* v. *Williams*, 294 U. S. 176 (1935);

The convenience or inconvenience to parties, the practical necessities of obtaining production of documents and witnesses (*Williams* v. *Green Bay & W. R. R.*; *Rogers* v. *Guaranty Trust Co.*, both *supra*; *Hirshhorn* v. *Mine Safety Appliance Co.*, 54 F. Supp. 588, 591 (W. D. Pa., 1944); *Grismer* v. *Merger Mines Corp.*, 43 F. Supp. 990, 993 (E. D. Wash., 1942); Note (1937) 50 HARVARD LAW REV., 1119, 1184);

The possibility of a heavily increased burden on courts of the forum and the tendency of counsel to concentrate litigation in certain urban centers* (*Douglas* v. *N. Y., N. H. & H. R. R.*, 279 U. S. 377 (1929); *Collard* v. *Beach*, 81 App. Div. 582 (1903);

The amenability to process of the alleged wrongdoers (*Rogers* v. *Guaranty Trust Co.*; *Hirshhorn* v. *Mine Safety Appliance Co.*; *Grismer* v. *Merger Mines Corp.*; *Kelley* v. *American Sugar Refining Co.*, all *supra*; *Overfield* v. *Pennroad*, 113 F. (2d) 6 (C. C. A. 3d, 1940); *Saltz* v. *Saltz Bros.*, 84 F. (2d) 246 (App. D. C. 1936); *Miller* v. *Quincy*, 179 N. Y. 294 (1904); *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388 (1899);

The type of relief sought (*Williams* v. *Green Bay & W. R. R.*; *Langfelder* v. *Universal Laboratories*, both *supra*);

The effectiveness of the relief that may be granted and the possibility that a domiciliary court will render an inconsistent—and controlling—decree (*Williams* v. *Green Bay & W. R. R.*; *Rogers* v. *Guaranty Trust Co.*; *Kelley* v. *American Sugar Refining Co.*; *Grismer* v. *Merger Mines Corp.*; *Healey* v. *Reynolds Tobacco Co.*, all *supra*; *Sauerbrunn* v. *Hartford Life Insurance Co.*, 220 N. Y. 363 (1917); and

The not infrequent difficulty of construing foreign law and contracts made thereunder (*Langfelder* v. *Universal Laboratories*, *supra*).

Upon the basis of the above factors and upon the uncontroverted facts set forth in the moving affidavits

* See, *e. g.*, WOOD, SURVEY AND REPORT REGARDING STOCKHOLDERS' DERIVATIVE SUITS (New York State Chamber of Commerce, 1944).

(R. 19-28) and summarized above* the District Court, finding that it would be most unjust to require the respondent to meet the issues in the Eastern District of New York, held that considerations of convenience, efficiency and justice demanded that it refuse to entertain jurisdiction.

**The Criteria Applied.**

That the District Court's decision in the instant case was eminently correct is evident from the following pertinent considerations:

(1) *Directors*: None reside in New York—five reside in Illinois.

(2) *Officers*: No fiscal or general administrative officers are located in New York—all have headquarters in Illinois.

(3) *Employees*: No employees having personal knowledge or information about the issues involved are stationed in New York—all are located in Illinois.

(4) *Records*: None of the general or control records are located in New York—by requirement of law such records are kept in Illinois.

(5) *Witnesses*: All personnel of the Illinois Department of Insurance whose testimony in relation to regular published audits and rulings on particular practices will be required obviously are to be found in Illinois.

(6) *Expense*: The additional direct expense to Lumbermens of a trial in New York rather than in Illinois will be tremendous and hardly justifiable in an action ostensibly brought for its benefit; immeasurable other damage to Lumbermens

* Pages 4-6.

will result from the disruption of current operations by diversion of the time and attention of executive officers and employees.

(7) *Pending domiciliary suit*: There is now pending in the Northern District of Illinois, Lumbermens' domicile, a derivative suit* filed by the *same* attorneys,† complaining of the *same* alleged transactions (plus some subsequent transactions of the same type) and demanding the *same* relief. In that suit issue has already been joined.

(8) *Amenability of defendants to process*: Defendant Kemper, sole defendant in the first, third and fourth causes of action and co-defendant in the second, is before the Court in the *Schwartz* case; he is not amenable to process in the instant case.

(9) *Foreign Law*: Plaintiff's derivative rights, Lumbermens' rights, and Lumbermens' contractual and other relationships with Kemper & Co. must all be construed under Illinois law, particularly the comprehensive Insurance Code of that State and the administrative regulations issued thereunder.

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* *Louis J. Schwartz* v. *James S. Kemper, Mark Kemper, H. G. Kemper, James D. Cunningham, L. G. Pilmoor, Harry E. Stone, Harry A. Wheeler and Lumbermens Mutual Casualty Company*, N. D. Ill. (E. D.) No. 46C96. (American) Lumbermens Mutual Casualty Company and Lumbermens Mutual Casualty Company are one and the same organization. The prefix "(American)" has long been used in the State of New York to prevent confusion with a local insurance company having a similar name.

† Counsel upholding petitioner's position in the Eastern District Court and in the Circuit Court of Appeals are Messrs. Abraham L. Pomerantz and William E. Haudek of the New York Bar (R. 29, 30, 42, 5[illegible]). In the *Schwartz* action Mr. Pomerantz appears as an attorney of record and Mr. Haudek has appeared of counsel in proceedings already had therein.

In contrast to all of the above considerations, petitioner personally must do no more than prove that he is but one of Lumbermens' 400,000 policyholders; necessarily the balance of petitioner's evidence must be adduced from the books, records, and other documents of Lumbermens, and by examination of its officers and employees. By the institution of the *Schwartz* action, the negligible expense which would have been entailed by petitioner in suing in Illinois has been even further decreased. He is afforded an opportunity not only to intervene, but even to be represented "by a lawyer whom he knows and in whom he has confidence" (Brief, p. 18).

It is respondent's contention that no one factor present in this case (or in any case of this type) is decisive of the issue, but that a careful consideration of all factors present demonstrates the soundness of the decisions below.

Thus, the fact that the instant action seeks only an accounting for waste or diversion does not, as petitioner would have us believe, require the retention of jurisdiction. From the line of cases stemming from *Miller* v. *Quincy*, 179 N. Y. 294 (1904), petitioner infers an inflexible rule that an action for waste may be maintained in the State courts of New York against the directors of any foreign corporation, in any case and regardless of circumstances (Brief, p. 7). However, examination will disclose that in each case cited by petitioner jurisdiction was retained either because the corporation was foreign in name only, or because the corporation's principal place of business or its financial domicile was located in New York, or because all or a substantial part of its property was located there, or because most of the officers and directors were within the jurisdiction.

Likewise, the fact that a money judgment only is sought is not controlling. Consider, for example, the second cause of action, wherein petitioner seeks to have a court decide whether Lumbermens should acquire its business primarily through the use of agents and brokers or primarily through the use of its own personnel facilities. It is a matter of common knowledge, which this Court may judicially notice, that many insurance companies proceed on the one business basis; that many others equally prominent proceed on the other. Nevertheless, petitioner seeks to have a court find that Lumbermens could have operated "with equal efficiency" by employing only its own personnel and facilities. Necessary consequences of such a finding would be (1) the dictation of the corporation's future operations methods and (2) a present and direct interference with the corporation's business. The fact that the sanction applied is a money award, rather than an injunction does not change the internal effect of the determination and does not remove the necessity of determining the validity and enforceability, under Illinois law, of Lumbermens' contract with Kemper & Co. Cf. *Langfelder* v. *Universal Laboratories*, 293 N. Y. 200, 204, 205 (1944).

Nor are allegations of fraud or breach of trust decisive.

*Rogers* v. *Guaranty Trust Co.*, *supra*;
*Sternfeld* v. *Toxaway Tanning Co.*, 290 N. Y. 294, 296 (1943);
*Koster* v. *Shenandoah Corp.*, 258 App. Div. 1079 (1940).

## POINT III.

**The District Court was not bound by State law to accept jurisdiction.**

Neither the District Court nor the Circuit Court of Appeals was called upon to decide whether a District Court may, in a diversity case, decline jurisdiction where, upon identical facts, jurisdiction would have been retained by a State court. The Circuit Court of Appeals did not hold, as petitioner erroneously claims (Brief, p. 4), that had this action been brought in the New York State courts, jurisdiction would be mandatory. That Court merely footnoted in passing that "* * * it is interesting to note that the New York courts would not have declined jurisdiction had this been a derivative suit by a *shareholder* in a *stock* corporation" (R. 44-45, n. 2) (italics supplied), a conclusion which, it is believed, does not harmonize with the flexible rule stated in *Travis* v. *Knox Terpezone Co.*, 215 N. Y. 259 (1915) and re-affirmed in *Langfelder* v. *Universal Laboratories*, 293 N. Y. 200, 204, 205 (1944).

The instant action, moreover, is not a derivative suit by a shareholder in a stock corporation and does not even raise the question decided in *Weiss* v. *Routh*, 149 F. (2d) 193 (C. C. A. 2d, 1945) and *Gilbert* v. *Gulf Oil Corporation*, 153 F. (2d) 883 (C. C. A. 2d, 1946), cert. granted May 20, 1946.

## Conclusion.

Whether or not *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938) is applicable to the instant case, the same result will follow. The decision of the Second Circuit, far from enunciating a "novel and far-reaching principle" in the law of Federal jurisdiction and venue (Brief, p. 9) is in complete accord with the recent decision of this Court in the *Williams* case and is not at variance with State law. It represents a careful application of the principle of forum non conveniens in precisely the sort of situation where, as an instrument of justice, it should be applied. Without injuring plaintiff, and without favoring defendants, it provides a place of trial that will harm least and benefit most the interests of the entire body of Lumbermens policyholders.

**It is respectfully submitted that the judgment be affirmed.**

STUART N. UPDIKE,
*Attorney for Respondent.*

WEYMOUTH KIRKLAND,
HOWARD ELLIS,
LOUIS G. CALDWELL,
EDWARD M. MAHER,
*Of Counsel.*

Black J. p. 1

# SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1946.

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| Eugene Koster, Petitioner, v. (American) Lumbermens Mutual Casualty Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[March 10, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

This is a derivative action, in equity as are all such derivative actions, begun by plaintiff as a member and policyholder of Lumbermens Mutual Casualty Company "in the right of Lumbermen's and on behalf of all its members and policy holders." It was brought in the United States District Court for the Eastern District of New York, of which plaintiff is a citizen. Jurisdiction rests on diversity of citizenship. The defendants are the Lumbermens Mutual Casualty Company, a nominal defendant, organized under the laws of Illinois; one James S. Kemper, president and manager thereof, a citizen of Illinois, and James S. Kemper & Co., an Illinois corporation. The relief asked is that the other defendants account to Lumbermens, for damages it has sustained and for profits they have realized on certain transactions. It is alleged that defendant Kemper, as an officer of the company, has been guilty of breaches of trust by which he, his family corporation and his friends have profited. Plaintiff charges that Kemper's salary was improvidently increased from less than $75,000 to over $251,000; that although Lumbermens was staffed and equipped to write insurance without the intervention of any agency, he employed the Kemper Company and paid it "substantial sums" as "commissions, fees and otherwise" to Lumbermens' prejudice and Kem-

per's profit, and that Kemper caused assets of Lumbermens to be sold to himself and favorites at prices less than their values. Kemper individually was never served in New York. Unless he should be found within that jurisdiction, some of the alleged causes of action cannot be tried in this action in any event for want of an indispensable party. Some of its issues could be tried without him.

The district court, on motion to dismiss under the doctrine of *forum non conveniens*,[1] found that Lumbermens does business in forty-eight states, but its home and principal place of business are in Illinois. There its directors live; there all records are kept; and no witness shown to be necessary to either side of the case resides outside of Illinois. The plaintiff himself lives in New York, but he does not appear to have attended any meetings of policyholders or to have raised objection to the acts alleged, or otherwise to have personal knowledge so that he could possibly be a witness except as to his ownership of the policy of insurance which is not denied. It would appear necessary for him to make his own case largely from books and records in Chicago and from testimony of officers and witnesses resident there. It also is evident that the legality of many of these transactions will turn on the law of Illinois, under which Lumbermens exists and within whose

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[1] Some of our cases appear to hold broadly that the federal courts must exercise their jurisdiction, when they have it. *Hyde* v. *Stone*, 20 How. 170, 175; *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly's Adm'rs*, 18 How. 503. But this is not a case in which it is urged that a state statute restricting remedy to state proceedings defeats federal diversity jurisdiction, as they were, and as was *Chicot County* v. *Sherwood*, 148 U. S. 529. In those cases, the Court held that when a state recognizes a cause of action, suit may be brought on it in federal court if diversity jurisdiction is established. That holding has nothing to do with this case. We are concerned here with the autonomous administration of the federal courts in the discharge of their own judicial duties, subject of course to the control of Congress.

territory the questioned acts took place. That would be home law if the case were tried in Chicago; it would be foreign law to New York and the case, if tried there, would involve conflict of laws. It also is urged that plaintiff's total of premium payments is less than $250, which would be the maximum possible interest he personally could have in the controversy.

Under these circumstances, two courts below concurred in the view that the case should not be tried in New York as there was ample remedy available in the state and federal courts of Illinois. Both relied upon *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. The dissenting judge below considered that our more recent decision in *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549, implies disapproval of the *Rogers* case and restricts application of the doctrine of *forum non conveniens*. We brought the case here on certiorari. 328 U. S. ix.

This case involves the special problems of *forum non conveniens* which inhere in derivative actions, and which have been little considered by this Court. *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549, was not a derivative action brought in the right of a nominal defendant corporation. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, was a derivative action, but that feature of the case was given almost no attention and the emphasis was entirely on the extent to which it involved inquiry into the "internal affairs of a foreign corporation," certainly not the most distinguishing feature of these actions.

The stockholder's derivative action, to which this policyholder's action is analagous, is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by

which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request. With possible rare exceptions, these actions involve only issues of state law and, as in the present case, can get into federal courts only by reason of diversity in citizenship of the parties. Their existence and peculiar character were recognized by this Court in the old Equity Rules. Rule 27, 226 U. S. App., p. 8. The complexities and unique features of these actions, however, are relevant to the *forum non conveniens* issue, for in these, as in all other petitions for equitable relief, he who seeks equity must do equity, and the court will be alert to see that its peculiar remedial process is in no way abused.

The cause of action which such a plaintiff brings before the court is not his own but the corporation's.[2] It is the real party in interest and he is allowed to act in protec-

[2] 28 U. S. C. § 112 provides "that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than the said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found." 49 Stat. 1214. This reinforces the view that the cause of action is that of the corporation, if reinforcement is necessary. Moreover, it is obvious that the venue statute is not concerned with facilitating suit in the district of the stockholder's residence, but assures only that suit can be brought in any district in which the corporation could have sued. *Greenberg* v. *Giannini*, 140 F. (2d) 550. When suit is brought in the district of the stockholder's residence, the venue statute does not provide for service on the corporation "in any district wherein such corporation resides or may be found." Since the corporation is an indispensable party, *Davenport* v. *Dows*, 18 Wall. 626, it must be only the chance stockholder's suit which can be maintained at the stockholder's residence. Corporations which have stockholders in many of the states may not find it necessary to qualify to do business and consent to be sued in all the states in which they have stockholders.

tion of its interest somewhat as a "next friend" might do for an individual, because it is disabled from protecting itself. If, however, such a case as this were treated as other actions, the federal court would realign the parties for jurisdictional purposes according to their real interests. In this case, which is typical of many, this would put Lumbermens on the plaintiff's side. Illinois corporations would then appear among plaintiffs and among defendants, and jurisdiction would be ousted. *Indianapolis v. Chase National Bank*, 314 U. S. 63. But jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands. *Doctor v. Harrington*, 196 U. S. 579.

Plaintiffs also, as in this case, often have only a small financial interest in a large controversy. Plaintiffs, like this one, if their own financial stake were the test, sometimes do not have a sufficient individual interest to make up the required jurisdictional amount. Again this class of cases is favored with the fiction that plaintiffs' possible recovery is not the measure of the amount involved for jurisdictional purposes but that the test is the damage asserted to have been sustained by the defendant corporation. Hence, although a plaintiff's own interest may be small, if the conditions laid down by Rule 23 of the Rules of Civil Procedure for secondary actions by shareholders are complied with and jurisdiction is established, the federal courts are empowered to entertain the case. But the peculiarities of such actions should not be overlooked.

Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience,

which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown. But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened.* Such a plaintiff often may represent an important public and stockholder interest in bringing faithless managers to book. The nature of the secondary action is such that without invitation from other stockholders and without their approval or supervision, the plaintiff volunteers in a position that itself creates something of a fiduciary relationship.

While, even in the ordinary action, the residence of the suitor will not fix the proper forum without reference to other considerations, it is a fact of "high significance." *International Milling Co. v. Columbia Transportation Co.*, 292 U. S. 511, 520. But, in derivative actions, although the plaintiff may have a substantial interest of his own to protect, he may also be a mere phantom plaintiff with interest enough to enable him to institute the action and little more. He may have taken some active part in

* Before the decision of the circuit court in this case, a similar derivative action was begun against substantially the same defendants and on the same causes of action in the United States District Court for the Northern District of Illinois, Eastern Division. *Schwartz v. Kemper*, N. D. Ill. (E. D.) No. 46C96. It assures that this controversy will not be barred from judicial hearing for lack of prosecution within the statutory period. All but two of the defendants in that action have entered a general appearance, and petitioner's lawyers are associated with plaintiff 's counsel in that case.

the corporate affairs, or have personal knowledge of them, or have had dealings in course of protest and objection which make it requisite or at least expedient for him personally to be present at the trial. Or he may, like this plaintiff, make no showing of any knowledge by which his presence would help to make whatever case can be made in behalf of the corporation.

To entertain such an action places the forum in a position of responsibility toward the whole class which the plaintiff assumes to represent. To prevent collusive settlements and abuses, the Court must approve dismissal or compromise and often must give notice to the other potential plaintiffs, in this case to the other members and policy holders in whose behalf plaintiff sues and who have a right to be heard on the propriety of settlement. Rule 23, Rules of Civil Procedure. It also takes on the troublesome business of fixing allowances to counsel and accountants for the plaintiff payable out of the defendant corporation's recovery against other defendants.[4] Thus, such a litigation brings to the court more than an ordinary task of adjudication; it brings a task of administration; and what forum is appropriate for such a task may require consideration of its relation to the whole group of members and stockholders whom plaintiff volunteers to represent as well as to the nominal plaintiff himself.

The nature of the action imports other unusual considerations when trial courts are faced with applications to dismiss for reasons of *forum non conveniens*. It might well be that the books, records and witnesses to establish all or a part of the cause of action are in or near the chosen forum. But in other cases they may all be in some distant

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[4] *Trustees v. Greenough*, 105 U. S. 527; see federal cases cited throughout *Hornstein, The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L. Rev. 784. Fees allowed, moreover, vary greatly with local considerations as to professional scales and other determinants of expense.

jurisdiction, perhaps that of the defendants, as is the case here. In the ordinary suit it is plaintiff's own books and records and transactions that are important—in the derivative action it is more likely that only the corporation's books, records and transactions will be important and only the defendant will be affected by the choice of the place of production of records. In the present case, in response to defendant's motion and supporting affidavits, which *prima facie* established vexation to defendant and the inappropriateness of the court, the plaintiff shows not a single fact provable by record or witness within the district or state where he has brought suit. It is undenied that every source of evidence to prove plaintiff's own case, as well as for defendant to disprove it, is in Illinois.

The District Court also found that "the suit relates to the internal affairs of a foreign corporation" and for that reason also considered that the "courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." 64 F. Supp. 595, 599. But many kinds of cases may "relate to internal affairs of a corporation", and that fact does not have the same significance as to the doctrine of *forum non conveniens* in all settings.

Every issue of *ultra vires* or proof of officers' authority in a contract action involves inquiry into internal affairs, but that inquiry is not one which must be relegated to home jurisdiction. The contracts of a corporation may make its liabilities turn on such events as realization of net earnings which submit its internal affairs to scrutiny in order to determine liability and which any court with jurisdiction may adjudicate. *Williams* v. *Green Bay & Western R. R.*, 326 U. S. 549. On the other hand, private actions may involve the right of visitation or supervision, a public right existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers, to correct abuses of authority and nullify irregular proceedings. See *Guth*

v. *Harkness*, 199 U. S. 148, 159. Such cases present a more persuasive challenge to the jurisdiction of a court foreign to the corporation's domicile under the *forum non conveniens* doctrine. We are presented in this case "with no problem of administration" of the affairs of a foreign corporation of the sort which would lead a court to decline jurisdiction. See dissenting opinion of Stone, J., in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 145.

There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. That is one, but only one, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice. Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of *forum non conveniens*, which resists formalization and looks to the realities that make for doing justice.

*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, holds only that the district court ". . . was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. . . . Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations

of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case." 288 U. S. at 130–31. There was disagreement in that case as to whether the facts warranted exercise of the discretion but little as to the general rule by which discretion is governed and none as to existence of the power of the court.

In the *Williams* case we reversed an exercise of discretion by a trial court, but far from laying down a rigid rule to govern discretion we said, "Each case turns on its facts." 326 U. S. at 557. The facts in that case were quite different from those before us now. The action was a class suit brought to recover amounts alleged to be due to plaintiffs on debentures. There was a possibility that under one view as to construction of the debentures, the Court would have to review the corporate internal affairs to determine net earnings which were or should be available as dividends, and under another view, to decide whether under the applicable local law directors' discretion had been abused. In that case, as here, the plaintiffs resided in New York. But the opinion points out that the defendant, while legally domiciled elsewhere, maintained its financial office in New York; five of its six directors, all of its executive and fiscal officers except the president and general auditor, were found there; directors meetings were customarily held in New York; financial records, transfer books, minute books and the like were kept in New York. Reciting these facts, among others, we concluded "These facts plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered." 326 U. S. at 560. Accordingly, we held that the case should not have been dismissed.

Since this case is pending in New York and is a diversity case, it is appropriate to observe that the law of New

York, if applicable, is to the same effect as to the considerations to govern *forum non conveniens* questions in this class of cases. The cases on which petitioner relies to establish his contention that in a similar suit the courts of New York would not decline jurisdiction, seem to be ones in which the corporate defendant had its principal place of business in New York or a substantial amount of property there, which would assure the effectiveness of a judgment. *Miller* v. *Quincy*, 179 N. Y. 294; *Ramsey* v. *Rosenthal*, 242 App. Div. 526; *Hamm* v. *Christian Herald Corp.*, 236 App. Div. 639; *Tarlow* v. *Archbell*, 47 N. Y. S. (2d) 3, 7–8, *aff'd*, 269 App. Div. 837.[8] Those cases, however, do not consider whether the actions brought are vexatious or oppressive or whether the interests of justice require that the trial be had in a more appropriate forum. Their principal attention is given to the inquiry whether the suit concerns the internal affairs of the foreign corporation, and their uniform conclusion is that they do not.

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[8] Of the other cases cited by petitioner, *Goldstein* v. *Lightner*, 266 App. Div. 357, *aff'd*, 292 N. Y. 670, gave no expressed consideration to the problem of *forum non conveniens*, and in *Jacobs* v. *Mexican Sugar Refining Co.*, 104 App. Div. 242, the only question raised and decided was the jurisdiction of the court over the subject-matter of the suit. *Cf. Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388. In *Hallenborg* v. *Greene*, 66 App. Div. 590, the Appellate Division reversed in part a broad decree of the Supreme Court so as to restrict the exercise of the court's power to conform to its statement of the *forum non conveniens* doctrine: "When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister State, and it may contravene the public policy of the foreign jurisdiction or rest upon the construction of a foreign statute, the interpretation of which is not free from doubt—as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation—the court should decline jurisdiction because such questions are of local administration, and should be relegated to the courts of the State or country under the laws of which the corporation was organized." 66 App. Div. at 597.

But in taking that view of one of the factors to be considered in applying the doctrine of *forum non conveniens*, they say nothing to detract from the general rule of New York as stated by Cardozo, J., in *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 264: "To trace in advance the precise line of demarcation between the controversies affecting a foreign corporation in which jurisdiction will be assumed and those in which jurisdiction will be declined, would be a difficult and hazardous venture. A litigant is not, however, to be excluded because he is a stockholder, unless considerations of convenience or of efficiency or of justice point to the courts of the domicile of the corporation as the appropriate tribunals." And in *Langfelder v. Universal Laboratories*, 293 N. Y. 200, 204, the court said: "But it is well settled that jurisdiction in any case will be declined either in the absence of jurisdiction in the strict sense or where a determination of the rights of litigants involves regulation and management of the internal affairs of the corporation dependent upon the laws of the foreign State or where the court in which jurisdiction is sought is unable to enforce a decree if made or where the relief sought may be more appropriately adjudicated in the courts of the State or country to which the corporation owes its existence."

Confronted with defendant's motion and supporting affidavits in this case reciting the facts earlier set forth herein, the plaintiff was utterly silent as to any reason of convenience to himself or to witnesses and as to any advantage to him in expense, speed of trial, or adequacy of remedy if the case were tried in New York. He recited only that Lumbermens and the Kemper Company had been served with process, and that Kemper individually had not, but that plaintiff proposed to serve him on his "next visit to New York." For the rest, he relied on a memorandum of law. That the absence from the case of Kemper makes remedy in New York inadequate, if not

impossible, as to some counts is admitted. To that extent, it makes it inappropriate for a court in New York to adjudicate some closely related issues, deciding plaintiff's grievances piecemeal. Petitioner shows not a single witness or source of evidence available to him in New York and does not deny that his complaint will require exhaustive examination of the transactions of these Illinois corporations, all of which occurred in Illinois and are to be tested by its law. The plaintiff demanded trial in New York as matter of right and of law irrespective of the facts set out by defendant. This Court cannot say that the District Court abused its discretion in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff. We hold only that a district court, in a derivative action, may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses so little countervailing benefit to himself in the choice of forum as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1946.

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| Eugene Koster, Petitioner, v. (American) Lumbermens Mutual Casualty Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[March 10, 1947.]

Mr. Justice Black, dissenting.

I agree substantially with the dissent of Mr. Justice Reed, but wish to add this thought. Today's decision goes far beyond the dubious doctrine announced in *Rogers v. Guaranty Trust Co.*, 288 U. S. 123. There may be rare instances in which a federal court could decline to provide an equitable remedy against multi-state corporate defendants. A prayer for relief which requires the appointment of a receiver or the detailed and continuing supervision of the affairs of a defendant corporation whose headquarters is beyond the jurisdiction of the court would in my view constitute such a situation. *Cf. Pennsylvania v. Williams*, 294 U. S. 176.

The whole trend of recent congressional legislation has been to protect corporate stock and security holders. See Securities Act of 1933, 48 Stat. 74, 15 U. S. C. § 77a et seq. But this legislation was not intended as a complete substitute for the antidote provided by stockholders' suits for the dangers inherent in the modern development of frequent conflicts of interest between corporate owners and corporate managers. See Laswell, Dean and Podell, *A Non-Bureaucratic Alternative to Minority Stockholders' Suits*, 43 Col. L. Rev. 1036, 1045, 1047; Koessler, *The Stockholders Suit: A Comparative View*, 46 Col. L. Rev. 238, 241. Yet the Court's opinion sets up almost insuper-

able obstacles to many stockholders who would bring such suits. A California or Florida stockholder cannot easily go to Delaware, New Jersey, or New York to press his claims. And there is no good reason, in most actions brought to curb corporate mismanagement, why a stockholder should not bring such a suit in the state where he lives, bought his stock, and where the corporation has agents and does business. To put him to the inconvenience and disadvantage of going across the continent to the State of the managers to litigate his cause, all but nullifies his opportunity and inclination to sue to protect his interest and that of other owners.

MR. JUSTICE RUTLEDGE joins in this opinion.

# SUPREME COURT OF THE UNITED STATES

No. 206.—October Term, 1946.

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[March 10, 1947.]

Mr. Justice Reed, dissenting.

For the purposes of this case we may assume, without examining New York law, 153 F. 2d 888, 890, that a Federal District Court, in its discretion, can dismiss a cause on the ground that the forum is vexatiously inconvenient to the defendant. Still we think the exercise of such a power is not warranted in the circumstances of this case.

We need not restate the facts, which are amply set out by the majority. The sole inquiry is whether the exercise of discretion by the trial judge in this case was an abuse of his power. On motion of Lumbermens, joined in by no other defendant, for dismissal of the complaint on the grounds that the action would require interference by the court with the internal management of Lumbermens and that, further, an indispensable party had not been served, the trial court dismissed the complaint because it required interference with the internal affairs of a foreign corporation and because the forum was not convenient. The Circuit Court of Appeals affirmed the order of dismissal on the ground that the forum in which the action was brought was not convenient for the trial of the causes of action asserted by the complaint.

By a venue statute, Congress has provided that an action may be brought in the district where the plaintiff resides against defendants residing in other states than that of the forum. This plaintiff starts with a presumption in

his favor that he may maintain this action at his own residence. 28 U. S. C. § 112.

We need not tarry to consider the small interest of the plaintiff in the assets of his corporation, nor the effect of realigning the corporation on the side of the cause where its true interest lies. However interesting the implications of these facts, they have nothing to do with a dismissal on the ground of the inconvenience of the forum. The same facts would exist no matter what the forum, and they are accordingly not pertinent to our inquiry. Nor should we concern ourselves with the possibility that this may be a strike suit. Whatever the motives of the plaintiff, the only inquiry now here is whether the forum is inconvenient or not.

In some cases, which may at the expense of analysis be grouped under the doctrine of *forum non conveniens*, the convenience of the court may be important. In such cases the crowded condition of the court's calendar and its lack of familiarity with the law of another state may be weighty factors. But in those cases neither the defendant nor the plaintiff is a resident of the forum state. *Western Union Telegraph Co.* v. *Russell*, 12 Tex. Civ. App. 82; *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315; *Burdick* v. *Freeman*, 120 N. Y. 420; *Morris* v. *Missouri Pacific R. Co.*, 78 Tex. 17; see cases collected in 32 A. L. R. at p. 34. Cf. *Smith* v. *Empire State-Idaho Min. & Development Co.*, 127 Fed. 462. See also *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317. Such cases have the support of policy which hesitates to give an advantage to parties who do not bear the expense of supporting the courts of the forum. *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387. But where the cause is transitory and the plaintiff a resident of the forum state, the convenience to the court would seem to be outweighed by its duty to entertain actions brought by citizens of the state of which the court is an arm. See *Arizona Commercial Mining Co.* v. *Iron Cap*

*Copper Co.*, 119 Me. 213. Cf. *Mexican Nat. R. Co.* v. *Jackson*, 89 Tex. 107; *Slater* v. *Mexican Nat. R. Co.*, 194 U. S. 120. This would seem particularly true of federal courts whose duty it is to entertain suits between citizens of different states. *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549, 553–4.

Since the plaintiff in this action is a resident of the forum state, we are only concerned with the relative convenience of the parties. It is clear that ordinarily a plaintiff may bring his suit in a forum of his choosing regardless of the inconvenience to him of making proof, so long as venue is properly laid. But here, as the Court points out, should the inconvenience to the defendant far outweigh any convenience to the plaintiff, it would not be fair to oppress the defendant, for it is not a legitimate advantage to a plaintiff to vex his opponent. We cannot agree, however, that in assessing the relative convenience of the parties the court may put a burden upon the plaintiff to make a positive showing that it is to his legitimate advantage to bring suit in the forum of his choosing. It is the defendant's burden to convince the court that the forum is both inconvenient to it and not convenient to the plaintiff. Despite the necessity of going elsewhere for evidence, it is hardly capricious for a plaintiff to bring suit in his home state: the advantages of so-doing are usually no less real than apparent.

Accordingly we must judge this case from the showing made by the defendant as to the relative convenience of the parties in its affidavits in support of its motion to dismiss. The defendant's affiants urged that the suit be dismissed because all the proof would come from "vast quantities of documents" and witnesses located in Illinois, where the main offices of Lumbermens are situated, and that transporting these documents would put the defendant to great expense. They also urged that the plaintiff had never attended any meetings of the corporation, nor

ever protested to the Department of Insurance of Illinois which audited the books of Lumbermens, and that he was in a position where "the only proof personally to come from him is the establishment of his status as a stockholder." They also urged that the court was being asked to pass upon the internal management and affairs of Lumbermens.

As to the last argument: it is recognized of course that a federal court need not entertain a case which involves interference with the internal affairs of a corporation. *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; but see *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549. The Circuit Court was of the opinion that no interference with the internal affairs of a foreign corporation of a kind "to make the courts of Illinois a more appropriate forum than New York" would be required by this action. This Court specifically concedes there is no problem of corporate administration that leads to refusal of jurisdiction in this case. This Court, however, depends upon the relation of the issues to the internal affairs of a corporation as one factor in the exercise of the court's discretion to dismiss on the ground of *forum non conveniens*. If corporate administration is not involved the mere fact that the issues relate to the internal affairs of the corporation does not seem significant. Almost any suit against a corporation may involve an examination into corporate affairs. Here the only inquiry, other than the alleged misconduct of the defendant Kemper, has to do with the relationship between Kemper & Co. and Lumbermens. Although this inevitably involves inquiry into internal affairs of a corporation, as does any suit brought against a corporate fiduciary for breach of trust, that inquiry is hardly an interference with corporate administration.

When there is no showing of interference with corporate administration, the party seeking dismissal is forced to depend upon what "will best serve the convenience of the

parties and the ends of justice." This, we think, requires strong and clear proof to overcome the presumption that the place of trial is controlled by the venue statute. Mere inconvenience is not enough.

As for the expense to the defendant of bringing documents and witnesses to New York, even admitting that proof in this action will involve documentary evidence situated in Illinois or testimony of witnesses located in Illinois, it is not amiss to point out that the plaintiff must carry the burden *in this action* and must make his case before defense is necessary. Since both documents and witnesses are beyond the jurisdiction of the chosen forum it will be the plaintiff's expense initially to transport such records and witnesses, an inconvenience which he has determined to bear, if it is true that he has no other source of proof. But even supposing that the defendant will have to transport documents and witnesses to meet the plaintiff's proof, a bare allegation to that effect is hardly a showing of such hardship as to make it proper to dismiss this case on the grounds of *forum non conveniens*. The same allegation might be made in any action brought against the defendant in any state other than Illinois on any cause, contract or tort, which involves records of the company, and this even though the corporation has chosen to do business in forty-eight states. To dismiss a cause on such bare allegations without a particular showing of the hardship involved in transporting a mass of documents and witnesses not easily accessible to the forum puts a powerful weapon into the hands of corporations alleged to have improperly conducted their affairs. It has been the whole course of our law to break down barriers against calling corporations to account in all states where they may do wrong in doing business. *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165. Lumbermens qualified in New York to carry on its regular insurance business. It sold plaintiff a policy that shares in the profits

of that business and it should require a showing much stronger than any here made to require this policy holder to go away from home for relief.

Petitioner, on behalf of Lumbermens, seeks recovery for excessive payments and services by Lumbermens to those who dominate the company, and for sales of company assets to those persons at inadequate prices. Petitioner must prove these allegations. None are now denied by defendant. That petitioner's success will result in "monetary damage" to Lumbermens seems impossible. Petitioner's success will enrich Lumbermens at the expense of those who are alleged to have mulcted it of large sums. Petitioner speaks for the whole membership and all policy holders of Lumbermens. From this record, we do not see that an adequate basis of fact has been laid by the respondent's affidavits to overcome the right of petitioner to pursue his remedies in the District Court for the Eastern District of New York.

MR. JUSTICE BURTON joins in this dissent.